TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1955

No. 23

HARRY SLOCHOWER, APPELLANT,

vs.

THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

FILED DECEMBER 2, 1954

PROBABLE JURISDICTION NOTED FEBRUARY 7, 1955

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SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF KINGS

Index No. 15647 1952

In the Matter of the Application of VERA SHLAKMAN, Bernard F. Riess, Harry Slochower, Sarah R. Reidman, Henrietta A. Friedman and Melba Phillips, Petitioners, for an Order Pursuant to Article 78 of the Civil Practice Act,

against

THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK, Respondent; Annulling the Dismissal of Petitioners from Their Positions as Teachers in the Colleges of the City of New York and Directing Their Reinstatement Forthwith Without Prejudice to Their Rights and Status as Though Such Dismissals Had Never Occurred

NOTICE OF APPEAL TO APPELLATE DIVISION—December 19, 1952

SIR:

Please take notice that petitioners above named hereby appeal to the Appellate Division, Second Department, from the order of the Supreme Court, Kings County, entered in the office of the Clerk of Kings County on the 12th day of [fol. 8] December 1952 denying their application for an order pursuant to Article 78 of the Civil Practice Act and dismissing their petition herein and from the whole and each and every part of said order.

Dated: New York, December 19, 1952.

Yours, etc., WEIT & CAMMER, Attorneys for Petitioners, Office & P. O. Address, 9 East 40th Street, New York 16, New York.

To Dennis M. Hurley, Esq., Corporation Counsel, Attorney for Respondent, Municipal Building, New York 7, New York. Francis J. Sinnott, County Clerk, Kings County

[fol. 9] In Supreme Court of New York, Special Term, Part I

Order Appealed From—December 11, 1952

Present: Hon. Frank E. Johnson, Justice

The petitioners above named having applied to this Court for an order pursuant to Article 78 of the Civil Practice Act, requiring and compelling the respondent, The Board of Higher Education of the City of New York, to annul the termination of the employment of petitioners as teachers in the colleges of the City of New York and directing respondent to reinstate them to said positions without prejudice to their seniority, pension, promotion rights and other status as such teachers as though their employment had never been terminated, with back salary, and for other relief.

Now, upon reading and filing the petitioners' notice of application dated November 18, 1952, the petition verified by each of the above-named petitioners on November 18, 1952, together with Exhibit A thereto annexed, submitted in support of said motion, and the respondent's answer verified November 24, 1952, together with Exhibit A thereto annexed, submitted in opposition to said motion, and after hearing Witt & Cammer, Esqs. (Harold L. Cammer, Esq., [fol. 10] of counsel), attorneys for the petitioners, in support of said application, and Denis M. Hurley, Corporation Counsel (Michael A. Castaldi, of counsel), attorney for respondent, in opposition thereto, and after due deliberation, and upon filing the opinion of the court, it is

Ordered that the application be and the same hereby is denied, and it is further

Ordered that the petition be and the same hereby is dismissed.

Enter,

F. E. J., J. S. C.

Granted Dec. 11, 1952. Francis J. Sinnott.

[fol. 10a] Supreme Court of the State of New York,
County of Kings

[Title omitted]

Notice of Application—November 18, 1952

Sirs:

Please Take Notice that upon the annexed petition of Vera Shlakman, Bernard F. Riess, Harry Slochower, Sarah H. Riedman, Henrietta A. Friedman, and Melba Phillips, duly verified November 18, 1952, and the exhibits thereto annexed, the undersigned will move this Court at a Special Term, Part I thereof, to be held at the Courthouse, Municipal Building, in the Borough of Brooklyn, City of New York, on the 25th day of November, 1952, at ten o'clock in the forenoon for an order pursuant to Article 78 of the Civil Practice Act:

1) Requiring and compelling respondent Board of Higher Education of the City of New York to annul the termination of the employment of petitioners as teachers in the colleges of the City of New York;

2) Directing respondent to reinstate petitioners to said [fols. 10b-12] positions without prejudice to their seniority, pension, promotion rights, and other status as su[illegible] teachers as though their employment had never been te[illegible]minated, with back salary from the date of such termination to the date of their reentry into service in accordance with the order to be entered herein; and

3) Granting such other and further relief as to the Court may seem just and proper.

Dated, New York, November 18, 1952.

Yours, etc., Witt & Cammer, Attorneys for Petitioners, Office & P. O. Address: 9 East 40th Street, Borough of Manhattan, City of New York.

To The Board of Higher Education of the City of New York, 695 Park Avenue, New York 21, New York, Respondent; Denis M. Hurley, Esq., Corporation Counsel, Municipal Building, New York 7, New York, Attorney for Respondent.

[fol. 12a] Supreme Court of the State of New York,
County of Kings

[Title omitted]

Petition—November 18, 1952

To the Supreme Court of the State of New York:

The petition of Vera Shlakman, Bernard F. Reiss, Harry Slochower, Sarah R. Riedman, Henrietta A. Friedman, and Melba Phillips, respectfully shows and alleges:

1. Petitioners are residents and citizens of the State of New York.

2. Respondent, hereafter called the Board, is the corporate body organized pursuant to the Education Law of the State of New York, which is required to conduct and administer that part of the public school system of the City of New York which is of collegiate grade.

3. This is a proceeding under Article 78 of the Civil Practice Act to review and vacate the action of the Board in terminating the employment of petitioners, under circumstances hereafter set forth, for alleged violation of [fol. 12b] Section 903 of the Charter of the City of New York, hereafter called Section 903. Section 903 provides as follows:

> "If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and

such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency."

4. Each of petitioners was duly appointed to the position of teacher in the colleges of the City of New York many years ago and had been a teacher continuously thereafter until the termination of his or her employment, as hereinafter set forth. At the time of the termination of their employment, petitioners were teachers with tenure, employed by the Board as follows:

a) Petitioner Vera Shlakman was an assistant professor of economics at Queens College and had been a college teacher for fourteen years;

b) Petitioner Bernard F. Riess was an associate professor of psychology at Hunter College and had been a college teacher for twenty-four years;

c) Petitioner Harry Slochower was an associate professor of German at Brooklyn College and had been a college teacher for twenty-seven years;

d) Petitioner Sarah R. Riedman was an assistant professor of physiology at Brooklyn College and had been a college teacher for twenty-six years;

e) Petitioner Henrietta A. Friedman was an instructor of classics at Hunter College and had been a college teacher [fol. 12c] for twenty-five years;

f) Petitioner Melba Phillips was an assistant professor of physics at Brooklyn College and had been a college teacher for fourteen years except that she was on official leave during the period from 1941 to 1944.

5. On September 8, 1952, The Subcommittee To Investigate the Administration of the Internal Security Act and Other Internal Security Laws, a subcommittee of the Committee on the Judiciary of the Senate of the United States, hereafter called the Subcommittee, opened hearings in the City of New York. At the outset of said hearings, Senator Homer Ferguson, sitting as the Subcommittee, stated that "education is primarily state and local function" into which the Subcommittee had no desire to and did not intend to intrude and that "the subcommittee has limited itself to considerations affecting national security, which are directly

within the purview and authority of the subcommittee." Thereafter at a continued hearing on October 13, 1952, in response to a request for further clarification of the purpose of the investigation with reference to the language of Section 903, Senator Ferguson further stated that it is "a fair statement" that the Subcommittee was "not concerned with this from the point of view of a local problem, and particularly from the point of view of the property, government, or the affairs of the city, or the nomination, election, or appointment or official conduct of the city employees."

6. On September 24, 1952, petitioners Vera Shlakman, Bernard F. Riess, and Harry Slochower, and on October 13, 1952, petitioners Sarah R. Riedman, Henrietta A. Friedman, and Melba Phillips, appeared before the Subcommittee pursuant to subpoena.

[fol. 12d]. 7. Upon their appearances before the Subcommittee, petitioners were asked some questions concerning their employment by the Board, including such questions as the nature of their employment, the length of their employment, the places of their employment, the subjects they taught, and their extra-curricular activities as teachers. Petitione s answered all such questions.

8. Petitioners were also asked questions relating to the personal associations and affiliations and the political, social, and economic views and opinions of themselves and their parents, wives, brothers, sisters, and acquaintances.

9. Petitioners answered some and refused to answer others of the questions referred to in paragraph 8 on various and numerous grounds, including the ground that the Subcommittee had not jurisdiction to inquire into such matters, the ground that the First Amendment to the Constitution of the United States forbade such inquiry, the ground that the procedures of the Subcommittee violated their rights under the Fifth Amendment to the Constitution of the United States and that they could not be required under the Fifth Amendment to answer such questions, and on other grounds. The Subcommittee acquiesced in the refusal of petitioners to answer such questions.

10. In their appearances before the Subcommittee, petitioners at no time refused to answer any questions regarding the government, property, or affairs of the city or of

any county or regarding their official conduct as employees of the Board.

11. At the time of their appearances before the Subcommittee, petitioners did not refuse to answer any questions regarding the government, property, or affairs of the [fol. 12e] city or of any county or regarding their official conduct as employees of the Board on the ground that the answer thereto might tend to incriminate them.

12. On October 3, 1952, petitioners Vera Shlakman, Bernard F. Riess, and Harry Slochower were advised by the respective presidents of the colleges at which they taught that they were suspended as of the close of business that day because of the provisions of Section 903. On October 6, 1952, the Board by resolution declared the positions of petitioners vacant and terminated their employment as of the close of business October 3, 1952. A true copy of said resolution is annexed hereto as Exhibit A, and made part hereof. On October 28, 1952, petitioners Sarah R. Reidman, Henrietta A. Friedman, and Melba Phillips were similarly suspended by the respective presidents of the colleges at which they taught on the same ground. On November 17, 1952, the Board by resolution declared the positions of said petitioners vacant and terminated their employment as of the close of business October 28, 1952. A true copy of said resolution is annexed hereto as Exhibit B, and made part hereof.

13. Before the suspension and termination of their employment as set forth in paragraph 12, none of the petitioners was served with charges nor given notice of a hearing and an opportunity to be heard by the Board, as provided for teachers with tenure by the Education Law.

14. The action of the Board in applying Section 903 to terminate the employment of petitioners as aforesaid violates Article XI, Section 1, and Article IX, Section 13B, of the Constitution of the State of New York which provide that education is exclusively a state function concerning which the city may not legislate.

[fol. 12f] 15. The action of the Board in construing and applying Section 903 of the City Charter (which is, by section 2, subdivision 1 and section 21 of the Home Rule Law a local law which cannot have the effect of superseding state legislation or of affecting the maintenance, support

or administration of the school system) was further unlawful in that

a) It is inconsistent with and vitiates the provisions protecting the tenure of teachers contained in the Education Law, particularly insofar as such provisions specifically require that they "shall not be so interpreted as to constitute interference with academic freedom",

b) It is inconsistent with and vitiates the provisions of the Education Law which require charges, notice, and a hearing as preconditions to the dismissal of teachers with tenure,

c) It is inconsistent with and vitiates the provisions of sections 25 and 26-a of the Civil Service Law which forbid inquiry into or response to questions pertaining to the political affiliations, associations, views, or opinions of a civil servant as a condition of public employment under penalty of misdemanor.

16. The action of the Board in applying section 903 is further unlawful in that

a) Petitioners, as teachers employed by the Board, were and are not employees of the City of New York, and

b) The Board as a body corporate created by and responsible to the state, is not an agency of the City of New York.

[fol. 12g] 17. The action of the Board in construing and applying Section 903 in the aforesaid manner

a) Violates the law of the land clause of Article I, section 1, of the Constitution of the State of New York and the due process clause of the Fourteenth Amendment to the Constitution of the United States.

b) Deprives petitioners of the rights and privileges guaranteed by Article I, section 1, of the Constitution of the State of New York and of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

c) Violates Article I, Sections 8 and 9, of the Constitution of the State of New York and the First and

Fourteenth Amendments to the Constitution of the United States.

d) Violates Article V, section 6, of the Constitution of the State of New York which prescribes merit and fitness as the sole tests in civil service without regard to political associations, affiliations, views, or opinions.

18. Even if Section 903 were otherwise applicable to teachers employed by the Board, the action of the Board in applying Section 903 in the circumstances was unlawful, unjust, arbitrary, and capricious in that

a) The Subcommittee was not authorized to conduct an inquiry regarding the property, government, or affairs of the City or the official conduct of petitioners as employees of the Board.

b) Whether authorized or not, the Subcommittee disclaimed that it was conducting an inquiry regarding the property, government, or affairs of the city or [fol. 12b] into the official conduct of petitioners.

c) Whether authorized or not, the Subcommittee was not engaged in an inquiry regarding the property, government, or affairs of the city or into the official conduct of petitioners.

d) Petitioners did not refuse to answer any questions regarding the government, property, or affairs of the city or their official conduct as teachers.

e) Petitioners did not refuse to answer any questions regarding the government, property, or affairs of the city or their official conduct as teachers on the ground that the answers thereto might tend to incriminate them.

f) Petitioners could not be compelled to and were, in fact, forbidding to answer the questions which they refused to answer as a condition of obtaining or retaining employment by the Board by reason of the provisions of sections 25 and 26-a of the Civil Service Law, which forbid inquiry into political affiliations, associations, views, or opinions as a condition of public employment in the state.

19. Even if section 903 were otherwise applicable to teachers employed by the Board, petitioners, as teachers

with tenure were nevertheless entitled to charges, notice, and an opportunity to be heard before their dismissals could be effected.

[fols. 125-127] Wherefore petitioners respectfully pray that the relief sought in the prefixed notice of application be granted as prayed for.

Dated, New York, November 18, 1952.

Vera Shlakman, Bernard F. Riess, Harry Slochower, Sarah R. Riedman, Henrietta A. Friedman, Melba Phillips. Duly sworn to by Vera Shlakman, et al. Jurats omitted in printing. (All in italics)

[fol. 128] EXHIBIT A, TO PETITION

Resolution Passed by the Board on October 6, 1952, Calendar No. 1

"Whereas, under date of September 24 and 25, 1952, Vera Shlakman, Bernard F. Riess and Harry Slochower testified before the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary of the United States Senate, and

Whereas, on Page 178 of the transcript of the testimony of Vera Shlakman, Counsel for the Committee asked her whether she ever had been a member of the Communist Party and she concluded her answer to this question as follows:

"On that ground, on the First Amendment, that is, and on the Fifth and Sixth I will decline to answer.

Senator Ferguson: I will sustain it on the Fifth Amendment."

[fol. 129] and Page 179 of the transcript of her testimony indicates that she was asked by Counsel:

"Have you ever been a member of the Communist Party?

Miss Shlakman: On the grounds previously stated I would decline.

Senator Ferguson: Sustained.

Mr. Morris: Are you a member of the Executive Board of the Teachers' Union?

Miss Shlakman: Yes.

Mr. Morris: As such, have you ever attended a Communist Caucus meeting?

Miss Shlakman: On the grounds previously stated, I will refuse to answer.

Senator Ferguson: Sustained, on the Fifth Amendment."

and

Whereas, Page 193 of the transcript of the testimony of Bernard F. Riess indicates that he was asked by Counsel to the Committee:

"Have you ever been a member of the Communist Party?"

and after asserting various reasons for refusing to answer that question, all of which appear to have been overruled, Mr. Riess stated on Page 196:

"I understand, but they are still part of my reasons; the Constitutional reasons under the First and Fifth Amendments.

Senator Ferguson: Under the Fifth Amendment, I will sustain your objection."

[fol. 130] After answering various questions concerning his membership or association with several organizations and persons, the following testimony took place (Pages 203-204):

"Mr. Morris: Have you ever used an alias, Professor?

Mr. Riess: That again is one of those questions to which I would like to seek some protection in the First and Fifth Amendments.

Senator Ferguson: Do you claim the Fifth Amendment on that?

Mr. Riess: The First and Fifth.

Senator Ferguson: I will sustain it under the Fifth Amendment, that it may tend to incriminate you.

Mr. Morris: I have no further questions."

and

Whereas, the transcript of the testimony of Harry Slochower shows that Counsel to the Committee asked him whether at that time (the 1940-1941 Rapp-Coudert Hearings) he was a member of the Communist Party (Transcript, Page 241), and after some colloquy, Counsel asked:

"The question is whether or not you were at that time when you were investigated in another investigation, and I would like to know whether or not you were at that time a member of the Communist Party."

After further colloquy, the following testimony appears:

[fol. 131] "Mr. Slochower: I am not a member of the Communist Party.

Mr. Morris: That is not the question: Were you at the time you are referring to, when you state some charge was made against you—were you at that time a member of the Communist Party?"

The witness' refusal to answer that question on the basis of the First Amendment was overruled by the Committee. Mr. Slochower then testified (Transcript, Page 244):

"Okay, sir. In that case I am left with only one answer, and that is, I have to invoke the Fifth Amendment, with regard to the question of whether I had been a member of the Communist Party in the years 1940 or 1941. I believe those were the years you mentioned.

Mr. Morris: At the time you were identified before that Committee.

Mr. Slochower: However, I want to add I am not implying I am guilty. I understand that the Fifth Amendment has been put into the Constitution for the purpose of protecting the innocent. I am availing myself of that privilege.

Senator Ferguson: Under the Fifth Amendment I will allow you to refuse to answer."

Again, at pages 246 and 254, it appears that the witness refused to answer questions on the basis of the Fifth Amendment concerning past membership in the Communist [fol. 132] Party. At Page 254, Counsel to the Committee asked the witness whether he had ever used an alias. After some colloquy, the following appears in the transcript (Page 255):

> "Senator Ferguson: You refuse to answer on the grounds of the Fifth Amendment.
>
> Mr. Slochower: That is, whether I was known under any other name: Again for very good reasons, which do not imply guilt."

and

Whereas, the Corporation Counsel has advised the Board that the refusal to answer questions on the only ground which was sustained, namely, the Fifth Amendment, constitutes a refusal to answer the respective questions on the ground of self-incrimination, and

Whereas, the Corporation Counsel has further advised that questions directed to an employee of this Board concerning past or present membership in the Communist Party constitute an inquiry into the employee's official conduct within the purview of New York City Charter, Section 903, and

Whereas, Section 903 provides as follows:

> "Section 903. If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearings or [fols. 133-138] inquiry, or having appeared shall refuse to testify or to answer any questions regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in rela-

tion to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency."

and

Whereas, the Presidents of Queens College, Hunter College and Brooklyn College have advised this Board of the suspension of Professors Vera Shlakman, Bernard F. Riess and Harry Slochower, effective as of the close of business, October 3, 1952, and have reported their action to this Board,

Therefore be it resolved, that the positions of Vera Shlakman as Assistant Professor at Queens College, Bernard F. Riess as Associate Professor at Hunter College, and Harry Slochower as Associate Professor at Brooklyn College, are declared vacant and that their employment is hereby terminated effective as of the close of business October 3, 1952, pursuant to the provisions of Section 903 of the New York City Charter.

[fol. 138a] SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

[Title omitted]

ANSWER

The respondent for its answer to the petition herein by Denis M. Hurley, Corporation Counsel, its attorney, alleges:

First: Denies each and every allegation contained in paragraph "5" thereof, except admits that on September 8, 1952, the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws, a subcommittee of the Committee on the Judiciary of the [fol. 138b] Senate of the United States, opened hearings in the City of New York and that at the outset of said hearings,

nator Homer Ferguson, sitting as the subcommittee, ated:

"The Committee will come to order. The United States Senate Internal Security Subcommittee, of the Committee on the Judiciary, is now in session.

We are here today to take testimony relating to subversion in our educational process. The training of our youth today determines the security of the nation tomorrow. The nature of this inquiry will be national in scope, and will relate to determine whether or not organized subversion is undermining our educational system.

We shall endeavor to sketch a broad general picture, leaving the determination of individual cases to state and local authorities.

The subcommittee gives full recognition to the fact that education is primarily a state and local function. Hence, the subcommittee has limited itself to considerations affecting national security, which are directly within the purview and authority of the subcommittee.

The Internal Security Subcommittee of the Senate Judiciary Committee, was empowered on December 31, 1950, under the terms of the Senate Resolution 366 of the Eighty-first Congress, to make a complete and continuing study and investigation of, first, the administration, operation, and enforcement of the Internal Security Act of 1950; secondly, the administration, operation and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; thirdly, the extent, nature and effect of subversive activities in the United States, its territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be, under the domination of foreign government organizations, or organizations controlled by the world communist movement, or any other movement seeking to overthrow the Government of the United States by force and violence.

[fol. 138c] This authority was subsequently extended under resolution No. 7 of the Eighty-Second Congress, until December 31, 1952."

The respondent further admits that at a continued hearing on October 13, 1952, the following colloquy ensued between members of the Subcommittee and Harold Cammer, Esq., the attorney for a witness then being interrogated:

Mr. Cammer: Mr. Morris, not by way of objection but only by way of clarification, at the opening of this hearing

Senator Ferguson: I think, Mr. Chairman, that counsel should confer with his client.

Senator Smith: He is fixing to ask us a question about procedure.

Mr. Cammer: I have discussed this with Mr. Morris.

Senator Ferguson: Is this something about procedure of the hearing?

Mr. Cammer: Yes sir, it is. It is not related to her answer and I am not attempting to lay any foundation for an objection or complaint about the question. I am not approaching it in that sense at all, Senator. I am simply asking for clarification of an issue which has arisen and concerning which there has been some confusion.

When you opened this hearing you did say that the purpose of this investigation was a federal purpose. I am not objecting to that, with the view of carrying out the legislative intent, of, perhaps, framing some legislation. I simply wanted to ask Mr. Morris whether this inquiry is concerned with the property, government or affairs of the City of New York, or the nomination, election, appointment or official conduct of any employees of the City of New York.

Mr. Morris: I think you should direct that question to the chair.

Senator Smith: I would say that any information or evidence that comes out in this hearing should be available to the good officers of any group in American government, wherever it may be used. We are not trying to circumscribe or narrow the use that may be made of this evidence. So I do not think we can be [fol. 138d] expected to do that, and I do not see any need for us to attempt to delimit the terms under which this evidence may be used.

Mr. Cammer: I am not attempting to limit it, Senator. I do know, and I understood from Senator Ferguson, that this was a federal committee not concerned with local affairs or local problems. Again I emphasize this is not by way of an objection. I thought Senator Ferguson had made it pretty plain that you were not concerned with the property, affairs, or government of the city, or with the nomination, election, appointment or official conduct of city employees.

Senator Ferguson: Our questions aren't aimed at that.

Senator Smith: We are just trying to get the facts, the truth about these matters. We are inquiring about them.

Senator Ferguson: But as to whether or not she belonged to this organization, if she was a member and answered the question, then she might tell us all about it and we could tell, them, how it applied to the federal questions involved.

Mr. Cammer: Precisely that is what I thought you had in mind, and I felt in my own mind that you were not concerned with this from the point of view of a local problem, and particularly from the point of view of the property, government, or the affairs of the city, or the nomination, election or appointment or official conduct of the city employees. I understood you to say that right at the opening of the hearing.

Senator Ferguson: I think that is a fair statement, that we are not trying to dictate to the school board who they shall have as teachers, what they shall teach. But we do think that the security of this nation is determined by what teachers do teach, whether or not they follow the Communist line in teaching, whether or not they are members of the Communist Party, because the evidence seems to indicate clearly, up to date at least, and it has not been disputed by those who have been Communists, that the Communists owe allegiance to the Soviet Union and the Communist Party, and that when it conflicts in any way with the United State [fol. 138e] Government or the people, that Communism

and Russia controls their thinking. I think that is very material as to our security.

Mr. Cammer: Yes. And whether the youth's mind is going to be enslaved.

Senator Smith: I am not going to limit the questions I ask to any federal level. I think that anybody who is entitled to use this information who wants to use it, he is entitled to use it. This is an open hearing and I think it the American tradition of open hearings, with counsel present, I have no desire other than to see that every person, no matter what I may think about their actions, has a chance to defend themselves according to their Constitutional rights. I don't know what your purpose is in referring to federal level continually, but I have a suspicion in my mind why you want us to delimit it to the federal level. It is coming out, as I understand, for use, as every good citizen in America ought to want it to be used, for whatever purpose they want it for."

Second: Denies each and every allegation contained in paragraphs "7", "8" and "9" thereof, except refers to the photostatic copy of the certified transcript of the testimony of the said witnesses hereto annexed as Exhibit "A" for the text and legal effect thereof.

Third: Denies each and every allegation contained in Paragraphs "10" and "11" thereof.

Fourth: Denies each and every allegation contained in paragraph "14" thereof, except refers to Article XI Section 1, and Article IX, Section 13-b of the Constitution of the State of New York, for the text and legal effect thereof. [fol. 138f] Fifth: Denies each and every allegation contained in Paragraphs "15", "16", "17", "18" and "19" thereof.

Further Answering the Petition and for a First, Separate and Complete Defense Thereto, Respondent Alleges:

Sixth: On September 24, 1952, petitioners Vera Shlakman, Bernard F. Riess and Harry Slochower and on October 13, 1952, petitioners Sarah R. Riedman, Henrietta A. Friedman and Melba Phillips, pursuant to subpoenaes duly served

upon each of them, appeared before the Internal Security Subcommittee of the Committee on the Judiciary, United States Senate, at hearings held in New York City. After being duly sworn, each of the petitioners was asked various questions in the course of said hearings, including questions as to whether he was or ever had been a member of the Communist Party. Each petitioner refused to answer said question or questions on the ground that his answers might incriminate him, all of which is fully set forth in a photostatic copy of the certified transcript of petitioners' testimony at said hearing, a copy of which is annexed hereto as Exhibit A and made a part hereof.

[fol. 139] "Seventh: Part of the said testimony of the respective petitioners in the order in which said petitioners appeared before the Subcommittee is set forth herein, verbatim, as follows:

Vera Shlakman on September 24, 1952

Mr. Morris: Miss Shlakman, have you ever been a member of the Communist Party?

Miss Shlakman: Mr. Morris, I find it extraordinarily difficult to face my students with whom I have been concerned, particularly in recent weeks, in accordance with prescribed syllabus, to discuss the question of the role in the maintenance of self-government. It seems to me that a maintenance of the rule of free inquiry necessary to the preservation of self-government—I am getting involved in this sentence, but what I am getting at is, that the question is such as to destroy the rule of free inquiry, and therefore to challenge, to impair self-government.

[fol. 140] On that ground, on the First Amendment, that is, and on the Fifth and Sixth I will decline to answer.

Senator Ferguson: I will sustain it on the Fifth Amendment.

. . . . . .

Mr. Morris: Have you ever been a member of the Communist Party?

Miss Shlakman: On the grounds previously stated I would decline.

Senator Ferguson: Sustained.

Mr. Morris: Are you a member of the Executive Board of the Teachers Union?

Miss Shlakman: Yes.

Mr. Morris: As such, have you ever attended a Communist caucus meeting?

Miss Shlakman: On the grounds previously stated, I will refuse to answer.

Senator Ferguson: Sustained, on the Fifth Amendment.

Bernard F. Riess on September 24, 1952

Mr. Morris: Have you ever been a member of the Communist Party?

Mr. Riess: I would like to answer that by saying that, as a psychologist, I have an obligation to the profession which I represent. That profession is definitely on record as having objected to such questions, when they were asked about staff members at the University of California, when they were asked about visitors in this country from abroad, as psychologists, who were invited to an International [fol. 141] gathering of psychologists; and I certainly would object to that question as being asked of myself.

Senator Ferguson: I cannot recognize those reasons for refusal. They are not legal.

Mr. Riess: They are principled objections.

Senator Ferguson: They are not legal objections.

Mr. Riess: If I am forced to invoke the legal reason——

Senator Ferguson: You are not forced to do anything, you understand.

Mr. Riess: I am proceeding to elaborate on other reasons. As a college teacher, I believe that the American Association of University Professors has objected to anything of this sort. I think I would be betraying college teachers in answering.

Senator Ferguson: Do I understand that you believe that these teachers who come in here and say that they have never been members of the Communist Party are violating the Code of Ethics of the Teaching Profession?

Mr. Riess: I believe that they are weakening it.

Senator Ferguson: They are violating the principles and ethics of the college professors?

Mr. Riess: I think so.

Senator Ferguson: To admit that they are not members of the Communist Party?

Mr. Riess: Under the present circumstances, and with the attitudes and hysteria of today, I think that is undoubtedly true.

Senator Ferguson: So you think that the American Youth ought to be taught that the college profession stands for the principle that anyone who admits that they are [fol. 142] not members of the Communist Party and have never been, is violating the ethics of that high profession?

Mr. Riess: I don't think that is the implication I would draw from what I said.

Senator Ferguson: Do you not think that is what the public will draw?

Mr. Riess: I am afraid that that is the impression that is going to be created to the public.

Senator Ferguson: Your answer, from your answer. Isn't that what you told me, that you believed the ethics of the profession said a man should not answer the question?

Mr. Riess: I said the ethics of the profession would be violated if a man under pressure had to testify about his political beliefs. I do not think this is a function of a college teacher.

Senator Ferguson: Do you say that it is only a political party, the Communist Party?

Mr. Riess: It is recognized as such by the laws of the United States.

Senator Ferguson: That was not my question. My question was: Is it in your opinion only a political party?

Mr. Riess: As far as I know its operations, as far as I have read and heard about it, it is to me a political party.

Senator Ferguson: And only a political party?

Mr. Riess: And only a political party.

Mr. Morris: I do not think that he has answered the question: Have you ever been a member of the Communist Party?

Mr. Riess: I was going to ask whether I could add to those reasons?

Mr. Morris: All of which have been overruled.

[fol. 143] Mr. Riess: I understand, but they are still part

of my reasons: the Constitutional reasons under the First and Fifth Amendments.

Senator Ferguson: Under the Fifth Amendment, I will sustain your objection.

. . . . . .

Mr. Morris: Have you ever used an alias, Professor?

Mr. Riess: That again is one of those questions to which I would like to seek some protection in the First and Fifth Amendments.

Senator Ferguson: Do you claim the Fifth Amendment on that?

Mr. Riess: The First and Fifth.

Senator Ferguson: I will sustain it under the Fifth Amendment, that it may tend to incriminate you.

Mr. Morris: I have no further questions.

Senator Ferguson: That is all.

Harry Slochower on September 24, 1952

Mr. Morris: Were you mentioned in the 1940-1941 hearings, or identified in the hearings of the New York Legislative Committee, as a Communist?

Mr. Slochower: I wasn't present there when the testimony was given, but I was told that one of my colleagues by the name of Bernard Grebanier had mentioned the fact that I was, had been or was a member of the Communist Party.

Mr. Morris: Were you called in as a witness in that inquiry?

Mr. Slochower: You mean before the Rapp-Coudert? Oh, yes,—twice. Once it was a meeting with—well, yes: there [fol. 144] was an investigation. It was a private hearing, though. It never became public.

Mr. Morris: Were you at that time a member of the Communist Party?

Mr. Slochower: Well now, Mr. Morris, if you allow me to answer this question fully, I will have to begin with a literary allusion.

Mr. Morris: Well, it calls for a Yes or No answer, unless you want to invoke some kind of privilege.

Mr. Slochower: This is a very serious and I think you ought to allow me a little leeway. I beg your indulgence.

Senator Ferguson: I might ask this: Are you going to answer the question?

Mr. Slochower: I am going to answer, in my way.

Senator Ferguson: That is what I mean. You are going to answer the question?

Mr. Slochower: I am going to answer in my way; yes. I am going to communicate to you with respect to the question which you put.

Senator Ferguson: As to whether or not you ever were a Communist?

Mr. Morris: The question is whether or not you were at that time when you were investigated in another investigation, and I would like to know whether or not you were at that time a member of the Communist Party.

Mr. Slochower: I understand the question and I would like to answer in my own way.

Chances are that Senator Ferguson and the others are acquainted with a famous novel called "The Trial."

[fol. 145] Senator Ferguson: Has that anything to do with your answer?

Mr. Slochower: It has a lot.

In that novel there is a character who is accused by somebody of something he did not know what it was, and for the rest of his life is investigated and re-investigated until the end, when they staryed him to death. I was asked in 1940 or 1941—I have forgotten the date—this question which you are asking me again.

Since 1940, twelve years, this question has been asked again and again—by the Rapp-Coudert, by the Board and Faculty and so on, and I have had twelve years of the utmost difficulty of living, in trying to live down the accusation that was made.

Senator Ferguson: Have you ever answered that question?

Mr. Slochower: Yes, I did answer it.

Senator Ferguson: Go ahead and answer it now.

Mr. Slochower: I want you to understand the difficulty of facing the prospect of answering this question for the rest of your life. Is it original sin? Once somebody has accused you, you are guilty for the rest of your life?

Mr. Morris: What is your answer?

Mr. Slochower: I am not a member of the Communist Party.

Mr. Morris: That is not the question. Were you at the time you are referring to, when you state some charge was made against you, were you at that time a member of the Communist Party?

Mr. Slochower: I hope that the time is coming when the higher courts are going to declare that a question of this [fol. 146] sort is in violation of those traditions of America which I have learned to cherish.

I came here as an immigrant and I came from a country which knew oppression. I have the hope and expectation that the higher courts will declare that this question is not proper. I should like to protest on that basis of the First Amendment.

Senator Ferguson: I cannot recognize the First Amendment, as a lawyer and a member of the United States Senate. I cannot allow you to invoke that as a reason.

Mr. Slochower: There is a possibility that the high courts might reverse you.

Senator Ferguson: I do not believe they will or I would rule otherwise.

Mr. Slochower: The other thing is that I am hoping also that the time may come when it will be declared that this Federal body has no jurisdiction in a matter which concerns a city or state educational system. This is another ground on which I should like to protest against the question.

Senator Ferguson: I will deny that ground.

Mr. Slochower: O.K., sir. In that case I am left with only one answer, and that is, I have to invoke the Fifth Amendment, with regard to the question of whether I had been a member of the Communist Party in the years 1940 or '41. I believe those were the years you mentioned.

Mr. Morris: At the time you were identified before that committee.

Mr. Slochower: However, I want to add I am not implying I am guilty. I understand that the Fifth Amendment has been put into the Constitution for the purpose of pro- [fol. 147] tecting the innocent. I am availing myself of that privilege.

Senator Ferguson: Under the Fifth Amendment I will allow you to refuse to answer.

. . . . . .

Mr. Morris: Do you know any professor or any teacher on the Brooklyn faculty who was at some time a member of the Communist Party?

Mr. Slochower: Mr. Morris, as I told you in executive hearing, I am willing to answer all questions pertaining to this nature which cover roughly the past ten to twelve years. Beyond that—well, I would say I would always answer your questions about my birth and confirmation and things like that, but beyond the twelve years, questions of this type, I am forced to refuse.

Senator Ferguson: In other words there is a certain period that you refuse to answer about, under the Fifth Amendment?

Mr. Slochower: Yes, sir.

. . . . . .

Mr. Slochower: You see, as soon as you bring up the dates, I have to——

Senator Ferguson: He has to invoke the Fifth Amendment back of that time, he indicates to the committee.

Mr. Morris: Mr. Chairman, May I raise one point, as a legal matter?

If we go back ten and twelve years, I wonder what statute of limitations runs that long and what kind of crime would be outlawed by it?

Senator Ferguson: The difficulty is that there are some crimes that are not barred by the Statute of Limitations, such as absence from the country extending the period; also [fol. 148] the fact that something there could connect a person with a crime now. And in all rulings here I want to use the Constitution in its broadest sense, and I just feel that, and think that this man is conscientiously claiming this on the ground that it might tend to incriminate him.

Mr. Slochower: I have very good reasons for doing it, but I cannot tell the reasons. The reasons are very good, and it has to do not with implying anything about guilt, Senator—nothing at all.

Senator Ferguson: So I just merely give him the benefit of the doubt, and do not require him to answer.

. . . . . .

Mr. Morris: I don't mean that, Professor. I mean, have you ever been known over a long period of time by a name other than your own name?

Mr. Slochower: In the Old Country, my mother used to call me Hirschel. First it was Anglocized to this country to Hirsch, and then Harry, and when people want to compliment me, they call me Henry.

Mr. Morris: You know the ordinary implications of the question:

Have you ever been known by an alias?

Mr. Slochower: You are referring to political things?

Senator Ferguson: Did you write under another name?

Mr. Slochower: Again, if it is a question with regard to the past ten to twelve years——

Senator Ferguson: You refuse to answer on the grounds of the Fifth Amendment.

[fols. 149-174] Mr. Slochower: That is, whether I was known under any other name. Again for very good reasons, which do not imply guilt.

Henrietta Friedman on October 13, 1952

Mr. Morris: Mrs. Friedman, have you ever been a member of the Communist Party?

Mrs. Friedman: Mr. Chairman, I must decline to answer this for the reasons that I have already given.

Mr. Morris: Is one of the reasons the fact that your answer will incriminate you?

. . . . . .

Mr. Morris: The question was were you ever a member of the Communist Party.

Mrs. Friedman: I said I must decline to answer that for reasons I have already given.

Mr. Morris: Is one of the reasons that your answer may incriminate you?

Mrs. Friedman: I gave you several other reasons.

Mr. Morris: Is that one of your reasons?

Mrs. Friedman: Yes, that is one of my reasons.

Mr. Morris: Are you presently a member of the Communist Party?

Mrs. Friedman: I must decline to answer that.

Senator Smith: For the same reason?

Mrs. Friedman: For all of the reasons I have given you.

Mr. Morris: Have you been a leader in a forum in the Communist Party Club?

Mrs. Friedman: Mr. Chairman, I must decline to answer that for all of the reasons that I have given you.

[fol. 175] EXHIBIT A TO ANSWER

Testimony of Harry Slochower, 221 East 18th Street, Brooklyn 26, New York, Accompanied by his Attorney, Royal W. France.

Senator Ferguson: Raise your right hand, Doctor.

You do solemnly swear in the matter now pending before this subcommittee of the Judiciary Committee of the United States Senate, that you will tell the truth, the whole truth, and nothing but the truth, so help you God.

Mr. Slochower: I do, sir.

[fol. 176] Mr. Morris: Will you give your full name and address to the reporter please?

Mr. Slochower: My name is Harry Slochower, S-l-o-c-h-o-w-e-r, and I live at 221 East 18th Street, Brooklyn 26, New York.

Mr. Morris: What do you do, Mr. Slochower?

Mr. Slochower: You mean: What is my occupation?

Mr. Morris: What is your occupation?

Mr. Slochower: I teach and write and lecture.

Mr. Morris: What do you teach?

Mr. Slochower: I am officially in the Department of German, but it so happens that various developments within the college, that most of my courses are in comparative literature, and world literature.

Mr. Morris: Are you a full professor?

Mr. Slochower: I was hoping to become one next year, but what this will do to that chance, I don't know. As a matter of fact, yesterday morning I was asked to hand in some data on my contributions to publications. That was

yesterday morning. They didn't know about the subpoena and I didn't tell them because I was hoping that they wouldn't know. The very fact of the hearings, the very mention of the name in this type of thing—you are aware of it, Senator—is enough to indict one. You have only to be accused, then you are guilty. First comes the verdict and then comes the trial.

Senator Ferguson: That has been a very fine speech on your part. In other words, you are criticizing this committee for trying to look into the question of the internal security of the United States of America?

Mr. Slochower: No, sir.

[fol. 177] Senator Ferguson: Let us proceed along the line of getting the facts.

Mr. Slochower: No, sir; I am not. May I say something about your allegation?

Senator Ferguson: I, of course, heard what you had to say, and now you may start the examination.

Mr. Morris: Were you mentioned in the 1940-1941 hearings, or identified in the hearings of the New York Legislative Committee, as a Communist?

Mr. Slochower: I wasn't present there when the testimony was given, but I was told that one of my colleagues by the name of Bernard Grebanier had mentioned the fact that I was, had been or was a member of the Communist Party.

Mr. Morris: Were you called in as a witness in that inquiry?

Mr. Slochower: You mean before the Rapp-Coudert? Oh, yes—twice. Once it was a meeting with—well, yes; there was an investigation. It was a private hearing, though. It never became public.

Mr. Morris: Were you at that time a member of the Communist Party?

Mr. Slochower: Well now, Mr. Morris, if you allow me to answer this question fully, I will have to begin with a literary allusion.

Mr. Morris: Well, it calls for a Yes or No answer, unless you want to invoke some kind of privilege.

Mr. Slochower: This is a very serious matter and I think you ought to allow me a little leeway. I beg your indulgence.

Senator Ferguson: I might ask this: Are you going to answer the question?

[fol. 178] Mr. Slochower: I am going to answer, in my way.

Senator Ferguson: That is what I mean. You are going to answer the question?

Mr. Slochower: I am going to answer in my way; yes. I am going to communicate to you with respect to the question which you put.

Senator Ferguson: As to whether or not you ever were a Communist?

Mr. Morris: The question is whether or not you were at that time when you were investigated in another investigation, and I would like to know whether or not you were at that time a member of the Communist Party.

Mr. Slochower: I understand the question, and I would like to answer in my own way.

Chances are that Senator Ferguson and the others are acquainted with a famous novel called "The Trial".

Senator Ferguson: Has that anything to do with your answer?

Mr. Slochower: It has a lot.

In that novel there is a character who is accused by somebody of something he did not know what it was, and for the rest of his life is investigated and reinvestigated until the end, when they starved him to death. I was asked in 1940 or 1941—I have forgotten the date—this question which you are asking me again.

Since 1940, twelve years, this question has been asked again and again—by the Rapp-Coudert, by the Board of Faculty and so on, and I have had twelve years of the utmost difficulty of living, in trying to live down the accusation that was made.

[fol. 179] Senator Ferguson: Have you ever answered that question?

Mr. Slochower: Yes, I did answer it.

Senator Ferguson: Go ahead and answer it now.

Mr. Slochower: I want you to understand the difficulty of facing the prospect of answering this question for the rest of your life. Is it original sin? Once somebody has accused you, you are guilty for the rest of your life?

Mr. Morris: What is your answer?

Mr. Slochower: I am not a member of the Communist Party.

Mr. Morris: That is not the question: Were you at the time you are referring to, when you state some charge was made against you—were you at that time a member of the Communist Party?

Mr. Slochower: I hope that the time is coming when the higher courts are going to declare that a question of this sort is in violation of those traditions of America which I have learned to cherish.

I came here as an immigrant and I came from a country which knew oppression. I have the hope and expectation that the higher courts will declare that this question is not proper. I should like to protest on that basis of the First Amendment.

Senator Ferguson: I cannot recognize the First Amendment, as a lawyer and a member of the United States Senate. I cannot allow you to invoke that as a reason.

Mr. Slochower: There is a possibility that the high courts might reverse you.

[fol. 180] Senator Ferguson: I do not believe they will or I would rule otherwise.

Mr. Slochower: The other thing is that I am hoping also that the time may come when it will be declared that this Federal body has no jurisdiction in a matter which concerns a city or state educational system. This is another ground on which I should like to protest against the question.

Senator Ferguson: I will deny that ground.

Mr. Slochower: O. K., sir. In that case I am left with only one answer, and that is, I have to invoke the Fifth Amendment, with regard to the question of whether I had been a member of the Communist Party in the years 1940 or '41. I believe those were the years you mentioned.

Mr. Morris: At the time you were identified before that committee.

Mr. Slochower: However, I want to add I am not implying I am guilty. I understand that the Fifth Amendment has been put into the Constitution for the purpose of protecting the innocent. I am availing myself of that privilege.

Senator Ferguson: Under the Fifth Amendment I will allow you to refuse to answer.

Mr. Morris: In 1950, Professor Slochower, did you sign

a letter addressed to President Truman urging freedom for the leaders of the Joint Anti Fascist Refugee Committee?

Mr. Slochower: Yes, sir; I did.

Mr. Morris: That was reported in the Daily Worker of August 22, 1950, page 2.

Mr. Slochower: You would know that, but I didn't because I don't read the Daily Worker.

Mr. Morris: You do recall it?

Mr. Slochower: Yes; I wrote the letter. I can tell you what I wrote in it.

[fol. 181] Mr. Morris: Could you tell us?

Mr. Slochower: I was concerned with one member of the committee, Professor Bradley.

Mr. Morris: Professor Lyman R. Bradley?

Mr. Slochower: Yes, whom I knew personally, and who was a professor of German. My field was originally German, and we had many, many conversations about culture, and I found him to be a completely decent human being. I don't know anybody more so that Professor Bradley. It was out of a personal feeling that this man was put in jail and loses his job. Another person can go in another city and change his name or something, but this is an investment in which you lose it and you lose everything.

I felt so strongly about this friend of mine that I took this step, unprecedent in my case—I am not a political person. This was a personal appeal on behalf of Dick Bradley.

Senator Ferguson: Did you know at that time whether or not he was a Communist?

Mr. Slochower: How could I?

Senator Ferguson: I am asking you.

Mr. Slochower: You are implying that I have a basis of information.

Senator Ferguson: I asked you whether you did.

Mr. Slochower: No.

Mr. Morris: Do you know of any individual now living who was in the past a member of the Communist Party?

Mr. Slochower: Living or dead?

Mr. Morris: Any man now living. Do you know now any individual now living who was in the past a member of the Communist Party?

[fol. 182] Mr. Slochower: I am sure Joe Stalin is a member.

Mr. Morris: Do you know any professor or any teacher on the Brooklyn faculty who was at some time a member of the Communist Party?

Mr. Slochower: Mr. Morris, as I told you in executive hearing, I am willing to answer all questions pertaining to this nature which cover roughly the past ten to twelve years. Beyond that: well, I would say *I would say* I would always answer your questions about my birth and confirmation and things like that, but beyond the twelve years, questions of this type, I am forced to refuse.

Senator Ferguson: In other words there is a certain period that you refuse to answer about, under the Fifth Amendment?

Mr. Slochower: Yes, sir.

Senator Ferguson: And outside of that period you are perfectly willing to answer the questions?

Mr. Slochower: Anything you want, sir.

Senator Ferguson: I understand that.

Mr. Morris: Professor Slochower, have you done anything in the last ten or twelve years which would indicate, in your opinion, opposition to the Communist organization?

Mr. Slochower: You see, Mr. Morris—I should address myself to you.

Senator Ferguson: That is perfectly all right.

Mr. Slochower: My field is not politics. My field is philosophy, literature, art, and now it is the Myth. Now, within that field, by implication one might say I am for or against—but the difficulty of the question is this: So far as I know, there is no Communist doctrine which is dogmatic—as far as I know.

[fol. 183] Mr. Morris: You know the question refers to the Communist organization, not the Communist theory.

Mr. Slochower: The Communist Party—that I have done anything against it?

Mr. Morris: Yes.

Mr. Slochower: What chance would I have?

Mr. Morris: I am asking if you have.

Mr. Slochower: I would have to join a political party of some kind. I don't know how that is possible.

I could tell you this: that within my field I have expressed myself in many ways which directly and by implication accounted to some doctrines held by many Communists.

Senator Ferguson: I did not quite get that.

Mr. Slochower: I say that in my field, I could point to a number of things I differ if not am opposed to positions held on these questions; let us say literature and philosophy, opposed to positions held by many Communists. I say "many" because there is no dogma as far as I know on philosophy.

Senator Ferguson: Do you think there is freedom of thought in philosophy?

Mr. Slochower: You mean in the Soviet Union? You mean in our sense?

Senator Ferguson: Yes.

Mr. Slochower: I will tell you.

Senator Ferguson: I wish you would.

Mr. Slochower: The thing has to be viewed historically. Russia and the whole East has never known economic, social, political and intellectual freedom. They never had an American Revolution and never a French Revolution. [fol. 184] Absence of a middle class prevented all of those wonderful things.

Senator Ferguson: They lacked the idea of freedom of religion and freedom of thought and assembly?

Mr. Slochower: It is conceivable to me why most of the Russian people might accept certain lines, because they don't miss them. So freedom of thought in our sense certainly cannot be present anywhere in the East and I don't even mean Russia—China or Greece or Turkey or Africa, any of those countries which never had a French Revolution or an American Revolution, with all the ideals of laissez faire. We have had them and we had to fight for them to keep them and not fall into the very trap that we think we are being led by them.

Mr. Morris: Professor Slochower, have you ever advocated that violence is justified?

Mr. Slochower: I am a man of peace. I am praying for peace. I have a little daughter.

Mr. Morris: Do you remember writing a book review, "Prospects of American Democracy," by George Counts, and this book review appeared in the New York Teacher in 1939?

Mr. Slochower: I recall that the review was published.

I hardly recognized the review, but I remember having written one.

Senator Ferguson: You claim it is not a proper quote?

Mr. Slochower: I don't know what the quote is.

Mr. Morris: You say, "It must be admitted that the problem of means and ends in its theoretical formulation pre- [fol. 185] sents something like an irresolvable enmity. Democracy is used at times in the sense of its ultimate form, i. e. a classless order; at other times, it stands for relative democracy as it exists under class rule. But, in his advocacy of means, Counts neglects to differentiate between the two kinds of democracies. The point seems to be that in class society, where democracy is relative, methods too must be relative.

If means are viewed in context, as means-end, Fascism in which violence is an end, cannot be lumped with Communism, where it is intended at worst, as a transitory weapon."

Mr. Slochower: I recognize that somewhat—not the formulation, you see.

Mr. Morris: There you say with respect to communism, "violence is intended, at worst, as a transitory weapon."

Senator Ferguson: What did you mean by that?

Mr. Slochower: I had reference to the famous theoretical position of one of the Marxist writers, what they call the Dictation of the Proletariat, is a transitory phase.

Senator Ferguson: In other words, you must have the Dictatorship as a means of going over into communism?

Mr. Slochower: That isn't precisely the point that they make. I think the point they make is that it may be necessary to have what they called "Dictatorship of the Proletariat".

Senator Ferguson: That is what Russia claims she has now—the Dictatorship, prior to transferring over to pure Communism?

Mr. Slochower: I think so, although some of them make [fol. 186] more ambitious claims, that they have gone already into the stage of socialism and not already advanced into the stage of communism. I am not sure of this. I was here formulating the philosophy and not the practice.

By the way, this "means to an end" did I use quotations? That isn't my phrase. It is John Dewey's, and I

here make public acknowledgments to John Dewey that this is his phrase and not mine.

Mr. Morris: That hyphenated word, you mean, not the whole paragraph?

Mr. Slochower: In one part of his development he held that position, and I was a student of his.

Mr. Morris: Have you ever written for the New Masses?

Mr. Slochower: Yes.

Mr. Morris: When did you write for New Masses?

Mr. Slochower: It is long ago, but I think it was primarily during the time of Hitler, during the '30's when, to my mind New Masses was identical with anti-Hitler. So was Science and Society.

Mr. Morris: Are you now a member of the Teachers Union?

Mr. Slochower: Yes, I am.

Mr. Morris: Have you any reason to believe that any Communists exist now and have existed in the past in the Teachers Union?

Mr. Slochower: I may be praised for this or damned, but my contacts in the Teachers Union have been so tenuous that the only thing I know is I send my dues in and then I get the news letter, and I see the kind of things which they do, which [fol. 187] I think are worth while—and that is why I belong.

Senator Ferguson: Do you ever see anything that they do in that news letter that is not worthwhile?

Mr. Slochower: I don't recall offhand. What I am concerned with about the Teachers' Union first is it is an organization in which the officers, and so on are elected by ballot, and I always get the ballot.

Senator Ferguson: Well, did you know Bella Dodd?

Mr. Slochower: Very slightly.

Senator Ferguson: Did you know that she told how they did it by ballot, but the Communists rigged it?

Mr. Slochower: Bella Dodd, I understand, is now in a personal state of mind where maybe she is seeing visions.

Mr. Morris: Who told you that?

Mr. Slochower: That is a literary term.

Senator Ferguson: Suppose she is telling the truth?

Mr. Slochower: Suppose she is.

Senator Ferguson: Do you think she might be?

Mr. Slochower: I have no way of knowing.

Senator Ferguson: Have you any evidence to show that she was wrong when she told, in effect, that she rigged the elections and rigged the passing of resolutions?

Mr. Slochower: Senator Ferguson, as a lawyer and former Judge, you know it is impossible, logically, ever to prove the negative, somebody said.

[fol. 188] Senator Ferguson: You indicated that she was seeing visions.

Mr. Slochower: Well, it is possible. She has had a very, very difficult time.

Senator Ferguson: I wondered whether you wanted it to stand as your answer.

Mr. Slochower: With regard to this, no. My point is you can never prove a negative.

Senator Ferguson: And you do not know whether or not they did rig the elections?

Mr. Slochower: Certainly not, but to prove what they didn't do—"When did you stop beating your wife?" You cannot prove a negative, legally, and I think it is recognized as such.

Mr. Morris: Professor, the question is: While you were in the Teachers Union, did you ever encounter any evidence of present-day or past Communist activity?

Mr. Slochower: As I said, my contacts have been so limited, because of my interest in writing and so on, and so forth, that I do not recall anything which suggests that, Mr. Morris.

Mr. Morris: Even when you were in Local 537?

Mr. Slochower: What was that?

Mr. Morris: The Teachers Union Local, when it was a separate local.

Mr. Slochower: When was that?

Mr. Morris: Certainly it existed in that form in 1940 and 1941.

Mr. Slochower: You see, as soon as you bring up the dates, I have to ——

Senator Ferguson: He has to invoke the Fifth Amendment back of that time, he indicates to the committee.

Mr. Morris: Mr. Chairman, may I raise one point, as a legal matter?

[fol. 189] If we go back ten and twelve years, I wonder

what statute of limitations runs that long and what kind of crime would be outlawed by it?

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Mr. Slochower: I have very good reasons for doing it, but I cannot tell the reasons. The reasons are very good, and it has to do not with implying anything about guilt, Senator—nothing at all.

Senator Ferguson: So I just merely give him the benefit of the doubt, and do not require him to answer.

Mr. Morris: Have you ever used an alias, a name other than your own?

Mr. Slochower: That sounds like an embarrassing question. You mean—well, when I went somewhere with somebody or what?

Mr. Morris: I don't mean that, Professor. I mean have you ever been known over a long period of time by a name other than your own name?

Mr. Slochower: In the Old Country, my mother used to call me Hirschel. First it was Anglocized to this country to Hirsch, and then Harry, and when people want to compliment me, they call me Henry.

[fols. 190-212] Mr. Morris: You know the ordinary implications of the question:

Have you ever been known by an alias?

Mr. Slochower: You are referring to political things?

Senator Ferguson: Did you write under another name?

Mr. Slochower: Again, if it is a question with regard to the past ten to twelve years——

Senator Ferguson: You refuse to answer on the grounds of the Fifth Amendment.

Mr. Slochower: That is, whether I was known under any other name? Again for very good reasons, which do not imply guilt.

Mr. Morris: Mr. Chairman, may this whole book review be introduced into the record?

Senator Ferguson: Yes.

(The book review referred to was received for the record.)

Mr. Morris: That is all. The next witness will be Professor Gene Weltfish.

Senator Ferguson: Mr. Morris, it is about five minutes to five. I do not know that we can finish this witness. I think we ought to go over to 9:00 in the morning.

Mr. Morris: Mr. Chairman, may we have the open session at 10:00, and continue the practice of having our executive session at 9:00?

Senator Ferguson: The executive sessions will be at 9:00 and the open session at 10:00 in the morning. You will all come back at 10:00 o'clock.

The committee will rise until 9:00 o'clock tomorrow morning.

Mr. Morris: Will the witnesses in open session who have not been heard be here at 9:00 o'clock tomorrow morning?

[fol. 213] Supreme Court of the State of New York
County of Kings

Opinion in Both Proceedings

By Mr. Justice F. E. Johnson

(N. Y. L. J., Dec. 8, 1952, p. 1415, col. 5.)

Dauiman v. Board of Education of City of N. Y.; Shlakman v. Board of Higher Education of City of N. Y. In these two proceedings under Article 78, some of the petitioners were dismissed by the Board of Higher Education and the others by the Board of Education of the City of New York, but the grounds upon which all the dismissals took place are so similar that the proceedings have been heard together, and should be decided together.

There is very little, if any, dispute of fact, and the differences of opinion are almost altogether on the law; they arise partly because of the difference of view as to the

status that these teachers had in relation to the City of New York. Generally speaking, the petitioners deny that they had such a relationship or status as made applicable to them Section 903 of the City Charter, under which the respondents here claimed power to act. They decided that the section was self-operating, and that the refusal of these petitioners to answer the questions asked them effectuated their dismissals, at least in substance, by reason of the language of that section.

One or more duly designated members of the Senate of the United States, held a hearing on the general subject of subversive influences; each of these petitioners appeared upon demand and all were confronted with various questions (which are not relevant here) in addition to the one or two questions that are relevant, namely, their relation to the [fol. 214] Communist Party or to Communism. The phrasing of the questions on these subjects is not criticized, nor can there be any doubt about their meaning; there is no suggestion that the slightest confusion did, or could, exist among any of the petitioners as to what they were being asked, or the meaning of the questions. In substance, the whole issue or problem here arises out of the questions concerning the present or past membership of these petitioners in the Communist Party. There were other similar, or related, questions that need not be detailed.

The world events that have been common knowledge for years past require this court to take judicial notice that the Party, which is really the group of fourteen men who, by armed might, hold the disarmed Russians in their grasp is not only preaching the destruction of non-Communist governments, but by espionage, sabotage, oppression and murder are, and have been, busily and successfully undermining the freedom of other disarmed nations that are now in a state of hopeless captivity to that small group. Their agent, the New York Communist Party, is continuously following the program here; their success among certain Americans, who have sold out their own government, is too well known to be further dwelt upon.

The 1949 Legislature declared the *policy of the State* (chap. 360) as to Communist Party members, as teachers, when it said: "The legislature further finds and declares

that in order to protect the children in our state from sub
subversive influence it is essential that the laws prohibiting
persons who are members of subversive groups, such a
[fol. 215] the communist party and its affiliated organiza
tions, from obtaining or retaining employment in the publ
schools, be rigorously enforced."

Mr. Marshall, while a Board of Education member, sai
in 1951: "The evidence before us is clear that Communis
Party members have a loyalty to Soviet Russia and to th
promotion of world Communism which is a higher loyalt
than loyalty to their own country; that class hatred an
the destruction of the bourgeois state are part of Commu
nist doctrine; that the seizure of power in the interest o
creating a so-called dictatorship of the proletariat is im
plicit in Communist Party membership; and that Part
members engaged in education have the special task of u
education for these purposes. The record shows this."

In his concurring opinion in the 1951 Dennis case (34
U.S. 494), Justice Jackson, of the Supreme Court of th
United States, said: "The Communist Party, nevertheless
does not seek its strength primarily in numbers. Its ai
is a relatively small party whose strength is in selected
dedicated, indoctrinated, and rigidly disciplined members
From established policy it tolerates no deviation and n
debate. It seeks members that are, or may be, secrete
in strategic posts in transportation, communications, in
dustry, government, and especially in labor unions wher
it can compel employers to accept and retain its members
It also seeks to infiltrate and control organizations or pro
fessional and other groups. Through these placements i
positions of power it seeks a leverage over society that wi
make up in power of coercion what it lacks in power o
persuasion."

[fol. 216] Our Court of Appeals has said that it is slander
ous to call anyone a Communist because of the low repute i
which that so-called ideology is held; it is not yet a *crim*
to call anyone a Communist. There have been many re
pressive adjudications, too well known to be cited here
that the Communist Party is, and has been, committed t
the program of changing all other governments by force
and that in this country a part of its program is the destruc

tion, by force, of the government under which we live; nowhere, however, is it claimed or has it been claimed that *membership* in the Communist Party is a *crime*.

Petitioners did not, however, merely refuse to answer since that might have been contumacious, so they gave the lawyer-like answer that undoubtedly was formulated for them by the counsel who either represented them, or most of them, on various occasions and who, as was not contradicted upon the argument hereof, gave active legal help in the formulation of some of their oral answers.

Those answers, in substance, were similar in that they all said that they would not say yes or no because the answer might tend to *incriminate* them; most of them specified the particular amendment of the Federal Constitution relied upon but, in substance, they said they would not reply lest they *incriminate* themselves. Their answers, as the minutes show, were that they were in danger of self-incrimination if they answered; they refused to admit anything, refused to make any answer that, as some said, might be used against them; in effect, and almost in form, refused to testify, as some said, against themselves.

[fol. 217] It is not claimed here that any particular answer given by any one of them had any other meaning than the foregoing; the issue was met squarely, upon the argument here by their counsel, who did not not seek in any way to evade the plain significance of what they were saying, but who took the position that they could not be *required* to answer such questions.

That argument is a combination of (1) a plea of the Federal Amendment and (2) a denial that the question was allowably asked because of the alleged inapplicability of the questions to these petitioners, since they claimed to be not within section 903.

After an exhaustive argument upon these questions the court was not able to learn what *crime* it was that they feared to expose themselves to prosecution for or what possible plausibility there was to the claim that answering might *incriminate* them.

That vain attempt to learn, upon the argument hereof, how it could reasonably or with intellectual honesty be said that one who was asked that question could sensibly say

that answering it might *incriminate* him, leaves the question still unanswered.

It is a fair inference, if there is any need to draw one, that they appeared before the committee well aware of why they were there, and all prepared to give a similar answer when each was asked that main question; there is also no reasonable doubt about what did happen on those hearings, namely, that they were asked in straight-forward language that very question and no one of them would answer.

[fol. 218] It may not be important to now consider the fact that the reason given to the Senate Committee was not intellectually honest because there is no such thing as a *criminal consequence* to those giving the answer; or that the entire plea was an "escape-method" based upon the completely fallacious suggestion that saying "yes" to the question would *incriminate* them. If, therefore, as it seems now, the question called for an answer that *could not possibly incriminate* them, and to plead the amendment was merely a subterfuge since it was completely inapplicable, this situation may have some relation to the conduct of the respondents. Article 78 brings up in this court of limited jurisdiction the question of the dismissals having been *arbitrary and capricious* (Matter of Humphrey, 298 N. Y. 327). Article 78 is like the writ of *certiorari*, and the review that is provided recognizes that the body or officer so reviewed has made a decision "which involves an exercise of judgment or discretion." It brings up whether the respondents, if exercising even quasi-judicial functions, have acted in *excess of jurisdiction* (but had jurisdiction of the subject-matter) and whether their authority has been used in the manner required by law, or has been so used as to violate the rights of the petitioners to their prejudice and whether any competent proof of the facts existed, &c.

The apparently complete inapplicability of this plea of non-incrimination seems relevant on the question of the natural and proper reaction of the respondent officers to the specious reason thus given to the Senate Committee; also because, as a matter of mere common sense, it throws [fol. 219] upon these teachers of the youth of the city the seemingly well-founded implication or accusation that their

attitude at that inquiry was not intellectually honest; that they successfully evaded the question on the unsound plea that they were in danger of *criminal* proceedings if they answered, although it is obvious that they could not be in the slightest danger of any proceedings of a *criminal* nature.

The inquiry of the Senate Committee was not irrelevant to the duties of the petitioners who had a special position towards the youth of the city; it is undeniable that children of school age are much more susceptible than adults to wrong suggestions, and if these petitioners had any notions that the average citizen considers wrong, the danger that might exist of their more or less deliberately poisoning the minds of the children would be very real. If the Communist Party *is* the enemy of this form of government, and *is* dedicated to its destruction, and they *are* or *were* members of it, it is common sense to believe that they too must be deemed to be committed to that destruction. If they were members, and sincere in their membership in a party committed to the destruction of our Constitution, it is ironical, when they are asked about that, to plead that very Constitution. The fact is that they were, by indirection, accused by the question of being *themselves* now, or in the past, committed to the overthrow of both the Constitution and the government based upon it. That charge they would not admit or deny; they evaded it by this intellectually false plea of supposed right to protection against imaginary [fol. 220] *criminal* prosecution under that smokescreen they were allowed to escape a direct answer.

Where does that leave them, from the standpoint of any intelligent parent whose child is to be inclosed in a classroom with them day by day? There are opportunities for, apparently, casual remarks and destructive comments, which are not only unlimited, but cannot be disproven or undone. If they belonged to a society for the establishment of robbery and murder (and, therefore, presumably themselves committed to a policy of theft and death) no sane person would want them to even approach his child. The destruction of this government will require wholesale bloodshed, so it seems amazing that any American citizen would be willing to join a party committed to its destruc-

tion, yet when asked a question based upon the (incredible) tacit assumption that they, by reason of such suggested membership, would seem to be committed to such wholesale bloodshedding and destruction, what kind of people are they who will not answer? They apparently insist on holding on to the *opportunity* to influence those who are too young to withstand the poison that might be dropped into their minds.

Therefore, when the question was asked each of them, their jobs were threatened; they had a dilemma facing them; if they admitted membership the special *duty* that they had towards the young, and the special *opportunities* they had with the young, and their practically unsupervised *contact* with children, would, undoubtedly cause an uprising among parents, and perhaps cost them their jobs. They dared not answer "Yes." But since, there was no public [fol. 221] registration of them, if they *were* members, and no place were they obliged to *swear* that they were members, how easily could they, if they really were members, have falsely and safely answered in the negative? That easy escape from the dilemma would be (if they *were* members) to *falsely* say they were *not* members, *thereby shutting the mouths of those implied (but could not prove) they were members.*

They did not take that escape position; they were under oath before the committee; if they *falsely* said they were *not* members (when in fact they knew they were members) they might *possibly* be prosecuted for perjury if the party's record was at hand.

What did they do, facing this dilemma? Their thought can have been: "If I *lie* about the *proper* answer to that question I will be guilty of perjury; I ought not to be asked to *tell a falsehood* which might render me subject to that *criminal* prosecution; therefore I plead the 5th Amendment."

They were *not asked to tell a falsehood*, presumably were asked only for the *truth*, and there is nothing in these papers, or on the argument, which suggests that they *thought* they were being asked to *lie* about the answer. If they were members, a truthful answer could not possibly do them any *criminal* law harm, although it might have cost

them their jobs. If they were not, then, or ever, members, why not say so?

Is there, therefore, any possible understanding of their position except that (1) if they answered truthfully that they were members, they would lose their jobs; if they [fol. 222] answered *falsely*, they might face prosecution for perjury? If that were the choice that faced them, the plea of the statute was not intellectually honest; their plea was founded upon the false *assumption* that they were being asked to falsify the answer and to say falsely that they were *not* members, whereupon, because of the *falsehood* under oath, they might be liable to perjury prosecution.

However, the entire purpose of the Amendment, and the only sensible meaning of it, is that no one shall be compelled to *tell the truth about himself* if it will do him criminal harm or be used against him *criminally*. That it may degrade him (as petitioners failed to claim) is not raised here. The only ground given was that they refused to *incriminate* themselves by telling the *truth*—when there could be no *crime* in so doing.

The respondents, upon the foregoing situation, surely were not guilty of arbitrary or capricious conduct when they decided that these petitioners were either intellectually dishonest or were, in fact, members of the party and so committed to everything that would be involved in a party attempt to destroy by force the government existing here and the Constitution upon which it was based.

Section 903 governs employees of both respondent bodies, not only because of the dual nature of each, but because there have been judicial decisions that so hold, in principle. Education is not, as claimed, said by the Constitution to be solely a *state* function; nothing in article IX or X warrants that claim. The Legislature, acting under § 6 of article IX, has ample power to delegate the local operation [fol. 223] of a school system to boards, like the respondents; that will have dual aspects and be both city and state agencies. No proof is given here that the city does not spend part of its own taxes for school buildings, &c.; it is also common knowledge that the members of both boards are appointed by the mayor. The title of each board indicates it is part of the city government, at least to a degree.

When the officials of these boards, whose duty it is to safeguard the children from being debauched mentally and morally, find that their teachers are putting on this false show of indignation over being exposed as apparent enemies of the nation, and are falsely claiming to be immune to the questions that go to the roots of their honesty and loyalty, and that when questioned they will not say yes or no to whether they belong to a group generally regarded as godless, disloyal, destructive and dishonest, are they arbitrary and capricious in dismissing them? Indeed, would not their retention of petitioners be grossly arbitrary and childishly capricious? Is not the cleansing of the city's school system of such foulness and danger one of the "affairs of the City" mentioned in section 903, which the respondent boards are in duty bound to attend to? The section makes the refusal to answer immediately effective, vacating the position each holds as soon as he or she has refused; they cannot (despite the dishonesty of their plea of the amendment) be compelled to answer, but the Legislature provided that *refusal* at once costs each his or her position. These respondents merely had to later carry out the formalities; the Legislature made the petitioners their own executioners.

The petitions are dismissed.

[fols. 224-231] Waiver of Certification (Omitted in Printing)

[fol. 232] Supreme Court of the State of New York, Kings County

[Title omitted]

Notice of Appeal to the Court of Appeals in Behalf of Petitioner Slochower—July 27, 1953

Sirs:

Please take notice that the Petitioner Harry Slochower hereby appeals to the Court of Appeals of the State of New York from an order in the above entitled proceedings entered in the office of the Clerk of the Appellate Division of

the Supreme Court of the State of New York, in and for the Second Judicial Department, on the 15th day of June, [fol.233] 1953, filed in the office of the Clerk of the County of Kings on July 7, 1953, and served upon the undersigned as attorneys for the Petitioner Harry Slochower, on July 13, 1953. The said order, from which Petitioner appeals, affirmed an order of the Supreme Court, Kings County, entered in the above proceedings, denying Petitioner's application for an order pursuant to Article 78 of the Civil Practice Act and dismissing the petition of the said Petitioner. Two Justices of the said Appellate Division of the Supreme Court of the State of New York dissented and voted to reverse the order of the Supreme Court, Kings County.

Please take further notice that the Petitioner Harry Slochower appeals from each and every part of the aforesaid order of the Appellate Division of the Supreme Court, and from the whole thereof.

Dated, New York, July 27, 1953.

Yours, etc., London, Simpson & London, Attorneys for Petitioner, Harry Slochower, Office & P. O. Address, 150 Broadway, New York 38, N. Y.

[fol.234] To: Clerk of the County of Kings, Hall of Records, Brooklyn 1, N. Y.; Witt & Cammer, Esqs., Attorneys for Petitioners other than Harry Slochower, 9 West 40th Street, New York, N. Y.; Denis M. Hurley, Esq., Corporation Counsel, Attorney for Respondent, Municipal Building, New York 7, N. Y.

[fol. 235] In Supreme Court of New York, Appellate Division

[Title omitted]

Appellate Division Order of Affirmance, Appealed from (Shlakman; Proceeding, All Petitioners) June 15, 1953

Present: Hon. Gerald Nolan, Presiding Justice; Hon. Frank F. Adel, Hon. Henry G. Wenzel, Jr., Hon. Frederick G. Schmidt, Hon. George J. Beldock, Justices.

[fol. 236] The above named Vera Shlakman, Bernard F. Riess, Harry Slochower, Sarah R. Riedman, Henrietta A. Friedman and Melba Phillips, petitioners in this proceeding, having appealed to the Appellate Division of the Supreme Court from an order of the Supreme Court entered in the office of the Clerk of the County of Kings on the 12th day of December, 1952, denying their application to annul a resolution, dated October 6, 1952, of respondent Board of Higher Education terminating the employment of three of the petitioners, and a similar resolution, dated November 17, 1952, terminating the employment of the remaining three petitioners, all pursuant to section 903 of the New York City Charter, herein, and the said appeal having been argued by Mr. Ephraim London of Counsel for appellant Harry Slochower, and argued by Mr. Paxton Blair of Counsel for appellants other than Harry Slochower, and argued by Mr. Michael A. Castaldi, First Assistant Corporation Counsel, of Counsel for respondent, and submitted by Messers. Robert M. Benjamin and Frank E. Karelsen of Counsel for Public Education Association, as amicus curiae, and due deliberation having been had thereon; and upon the opinion and decision slip of the court herein, heretofore filed:

It is Ordered that the order so appealed from be and the same hereby is affirmed, without costs. Adel, Schmidt and Beldock, JJ., concur; Nolan, P. J., and Wenzel, J., dissent and vote to reverse the order and to grant the application, with memorandum as contained in opinion and decision slip dated June 15th, 1953.

Enter.

John J. Callahan, Clerk.

[fol. 237] SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

MEMORANDUM OPINION OF APPELLATE DIVISION (DANEMAN PROCEEDING), 282 APP. DIV. 717

Appeal in an article 78 proceeding by eight petitioners (teachers in elementary, junior high and high schools of the City of New York) from an order denying their application to annul a resolution, dated October 2, 1952, of respondent Board of Education terminating the employment of six of the petitioners, and a similar resolution, dated October 23, 1952, terminating the employment of the remaining two petitioners, all pursuant to section 903 of the New York City Charter. Order affirmed, without costs (see Matter of Shlakman v. Board of Higher Education of the City of N. Y. (282 App. Div. 718), decided herewith. Adel, Schmidt and Beldock, JJ., concur. Nolan, P. J., and Wenzel, J., dissent and vote to reverse the order and to grant the application for the reasons set forth in their dissenting memorandum in Matter of Shlakman v. Board of Higher Education of the City of N. Y. (282 App. Div. 718).

MEMORANDUM OPINION OF APPELLATE DIVISION (SHLAKMAN PROCEEDING), 282 APP. DIV. 718

Appeal by six petitioners (two associate professors, three assistant professors, and one instructor, in three municipal colleges) from an order denying their application to annul a resolution, dated October 6, 1952, of respondent Board of Higher Education terminating the employment of three of the petitioners, and a similar resolution, dated [fol. 238] November 17, 1952, terminating the employment of the remaining three petitioners, all pursuant to section 903 of the New York City Charter.

Order affirmed, without costs.

In our opinion, petitioners are employees of the city within the meaning of section 903 of the New York City Charter (Matter of Withrow v. Joint Legislative Comm'n, etc., 176 Misc. 597; Matter of Goldway v. Board of Higher

Education, 178 Misc. 1023; Matter of Koral v. Board of Education of City of N. Y., 197 Misc. 221). The charter section is applicable to a hearing before a legislative committee of the federal government, even though that committee is not authorized to conduct an inquiry regarding the property, government or affairs of the city, or regarding the official conduct of an employee of the city (Matter of Koral v. Board of Education of City of N. Y. [supra]). An inquiry into present or past membership in the Communist party is a question regarding the official conduct of a teacher within the meaning of the charter section. Nor is such an inquiry barred by the provisions of sections 25 and 26-a of the Civil Service Law (Matter of Rabouine v. McNamara, 301 N. Y., 785). The New York City Charter is not a local law within the meaning of section 2 of the City Home Rule Law, but an emergency local law adopted pursuant to the provisions of the then Article XII, section 2 (now Article IX, sec. 11) of the New York State Constitution (Matter of Mooney v. Cohen, 272 N. Y., 33) and, therefore, provisions of the charter may modify or amend statutes inconsistent therewith, or be supplemental thereto (Matter of Finegan v. Cohen, 275 N. Y., 432). The charter provision does not [fol. 239] abridge the constitutional privilege against self incrimination (Canteline v. McClellan, 282 N. Y., 166; McAuliffe v. Mayor of New Bedford, 155 Mass., 216).

Adel, Schmidt and Beldock, JJ., concur.

Nolan, P. J., and Wenzel, J., dissent and vote to reverse the order and to grant the application, with the following memorandum:

We are in accord with the majority view that section 903 of the New York City Charter is applicable to a hearing before a federal legislative committee, and that an inquiry into present or past membership in the Communist party is an inquiry regarding official conduct of a city officer or employee." We also agree that the charter is not a local law within the meaning of the provisions of the State Constitution and the City Home Rule Law in effect when the charter was adopted, which prohibited cities from adopting local laws which superseded a state statute, if such local laws applied to or affected the maintenance, support or ad-

ministration of the educational system in such cities. We are at variance, however, with the conclusion of the majority that section 903 of the charter authorizes the summary termination of appellants' employment, and that appellants are employees of the city within the meaning of that section. Section 903 has application only to a "councilman or other officer or employee of the city". Appellants are not councilmen, and unless they are city officers or employees, their employment may be terminated only as provided in the Education Law of the State of New York. They are not officers of the city (Matter of Gelson v. Berry, [fol. 240] 233 App. Div., 20; Stefinson v. Board of Education of N. Y., 165 N. Y., 431; Minnally v. Board of Education of the City of New York, 46 Misc. 477). Neither are they employees of the city. They are employed by the respondent board, which like the Board of Education of the City of New York, is a corporation created by the state, entire-separate and apart from the City of New York, in so far as the administration of the educational system of the city is concerned (Education Law, secs. 2551, 6202; People ex rel. Wells & Newton Co. v. Craig, 232 N. Y., 125; Lewis v. Board of Education of City of N. Y., 258 N. Y. 117). In the administration of the educational system, such boards are not departments of the city government (Matter of Divisich v. Marshall, 281 N. Y. 170), nor do they act as the agents of the city (Titusville Iron Co. v. City of N. Y., 207 N. Y. 203; People ex rel. Wells & Newton Co. v. Craig, supra; Gunnison v. Board of Education, 176 N. Y., 11). Teachers employed in New York City contract with the Board of Education or the Board of Higher Education, and not with the city (Gunnison v. Board of Education, supra). The city does not hire them, nor may it prescribe their duties, or qualifications, or fix their salaries. In fact none of the usual characteristics of the relation of employer and employee exist, as between the city and teachers employed in the city schools.

It is apparently the majority view that it was the intention of the Charter Revision Commission to make section 903 of the charter all inclusive, so as to include within the provisions of that section all employees and officers in any way connected with the administration of the affairs of the

City of New York. We are unable to agree with that view. [fols. 241-242] We are dealing with language employed, not by laymen, but by a commission whose membership included able and distinguished lawyers, who were unquestionably familiar with the many pronouncements of the courts of the state to the effect that boards of education in cities were corporations separate and apart from the cities in which they existed, and who had no difficulty in stating, in plain language, when they wished to do so, the provisions of the charter which were to be applied to the boards of education and the public schools (see Chap. 20, New York City Charter). Such boards are not without power to deal with subversive activities in the schools under the provisions of the Education Law, and under other provisions of the charter (Education Law, secs. 2573, 6206; Charter, sec. 526). It is our opinion, however, that section 903 of the charter which provides for forfeiture of office or employment without notice or hearing, and which does not expressly include appellants within its terms should not be enlarged by implication or intendment beyond the fair meaning of the language used, to include persons other than those clearly described therein. The order appealed from should be reversed and the application should be granted.

[fol. 243] Triple Certificate to foregoing paper omitted in printing.

[fol. 244] In Court of Appeals of New York

In the Matter of Mary I. Dauiman et al., Appellants, against Board of Education of the City of New York, Respondent;

In the Matter of Vera Shlakman et al., Appellants, against Board of Higher Education of the City of New York, Respondent.

Opinion. Decided April 22, 1954

Conway, J. Petitioners who are teachers—the first group in public schools, the second group in public colleges—were subpenaed and appeared in September and October of 1952

before Senator Homer Ferguson, sitting in New York as a subcommittee of the Committee on the Judiciary of the Senate of the United States to investigate the administration of the Internal Security Act and other internal security laws.

Among other questions each of the petitioners was asked whether he or she was presently or had ever been a member of the Communist party. Each of them refused to answer, basing the refusal upon the privilege against self incrimination granted by the Fifth Amendment to the United States Constitution.

The board of education and the board of higher education received certified copies of the transcript of the minutes of the hearing. Each of these boards was advised by the corporation counsel of the City of New York that the refusal to answer questions on the only ground which was sustained, viz., the privilege granted by the Fifth Amendment, constituted a refusal to answer the respective questions on the ground that the answer would tend to incriminate within the meaning of section 903 of the New York City Charter and that questions directed to employees of the boards [fol. 245] concerning past or present membership in the Communist party constituted an inquiry into the employees' official conduct within the purview of the same section. Thereupon, the boards adopted resolutions terminating the employment of petitioners and declaring their positions vacant pursuant to the provisions of section 903. There is no claim by petitioners that their refusal to answer the questions based upon the privilege granted them by the Fifth Amendment does not constitute a refusal to answer upon the ground that the answer would tend to incriminate them within the meaning of Charter section 903, but only that the section, for various reasons to be discussed, is not applicable.

In this proceeding we are required to and do accept as truthful petitioners' assertion that answers to the questions propounded might have tended to incriminate them since that is the only reason that persons questioned by a congressional committee concerning their affiliation with the Communist party are entitled to invoke the protection of the Fifth Amendment to the United States Constitution (see

Blau v. United States, 340 U.S. 159). Similarly, we do not presume, of course, that these petitioners by their action have shown cause to be discharged under the Feinberg Law (L. 1949, ch. 360) since no inference of membership in the Communist party may be drawn from the assertion of one's privilege against self incrimination.

Section 903 reads: "If any councilman or other officer or *employee* of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge; *any legislative committee*, or *any* officer, board or body authorized to conduct *any* hearing or inquiry, *or having appeared shall refuse* to testify or to *answer any question* regarding the property, government or affairs of the city or of any county included within its territorial limits, *or regard* the nomination, election, appointment or *official conduct* of any officer *or employee* of the city or of any such county, *on the ground that his answer would tend to incriminate him*, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency." (Emphasis supplied.)

Section 903 is inoperative if the teacher gives either an affirmative or negative answer to the question posed—even though the answer be false. The effect of the answer on the teacher's fitness to continue teaching is for the board of education or of higher education, and those bodies only, to say. Section 903 becomes applicable only if the teacher witness refuses to answer upon the ground that the answer would tend to incriminate him or her. The teacher alone [fol. 246] possesses the power to bring the statute into play. The assertion of the privilege against self incrimination is equivalent to a resignation (*Matter of Koral v. Board of Educ. of City of N. Y.*, 197 Misc. 221). As the Supreme Court said in *Adler v. Board of Educ.* (342 U.S. 485, 492, aff'g. *sub nom. Thompson v. Wallin*, 301 N.Y. 476): "It is equally clear that they [teachers] have no right to work for the state in the school system on their own terms. [Case cited.] They may work for the school system upon the

reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere." And, many years ago Justice Holmes in *McAuliffe v. Mayor &c.* (155 Mass. 216, 220) said similarly: "The petitioner [a policeman], may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle, the city may impose any reasonable condition upon holding offices within its control."

There is nothing novel about such a statute. Other statutes provide for the vacatur of, or forfeiture of, an office or employment upon the happening of an event specified therein. (See, e.g., Greater New York Charter, § 1549; now New York City Charter, § 895; *Matter of Hulbert v. Craig*, 124 Misc. 273, affd. 213 App. Div. 865, affd. 241 N. Y. 525; *Metzger v. Swift*, 231 App. Div. 598; *Metzger v. Swift*, 258 N. Y. 440; Public Officers Law, § 30; *Matter of Buhler*, 43 Misc. 140; *Ginsberg v. City of Long Beach*, 286 N. Y. 400.) The people have similarly provided in our State Constitution as to all public officers who refuse to sign waivers of immunity under certain circumstances (art. I, § 6, and see *Cantaline v. McClellan*, 282 N. Y. 166, and cases cited therein).

There is no conflict between section 903 of the Charter and equally valid though differing procedures under the Feinberg Law (L. 1949, ch. 360) and under sections 2554, 2573 and 6206 of the Education Law which guarantee to teachers the right to hold their respective positions during good behavior and efficient and competent service and not to be removed except for cause after a hearing by the affirmative vote of a majority of the board. Section 903 of the Charter, the Feinberg Law and sections 2554, 2573 and 6206 of the Education Law are legislative enactments of equal dignity. The sections in the Education Law govern the removal of teachers for cause generally, by the board [fol. 247] of education and not by the city, whereas the

Charter section declares that there shall be a vacatur of office or employment for a particular cause. It merely imposes a condition upon public employment. The legislative acts are to be read in harmony and it is not within our judicial competence to decide for the Legislature, the board of education or the City of New York which shall be used.

Following the adoption of the resolutions of the boards terminating the employment of petitioners, they commenced these two article 78 proceedings. Special Term concluded that section 903 applied and had been violated by petitioners. The petitions were dismissed. The Appellate Division, Second Department, affirmed, two Justices dissenting. The majority held that teachers in New York City public schools and colleges are city employees within the meaning of Charter section 903; that the Charter section is applicable to a hearing before a Federal legislative committee; that an inquiry into past or present membership in the Communist party is an inquiry regarding official conduct of a city officer or employee; that such inquiry is not barred by the provisions of sections 25 and 26-a of the Civil Service Law; that the Charter is not a local law within the meaning of section 2 of the City Home Rule Law and that the Charter provisions do not abridge the constitutional privilege against self incrimination. The dissenting Justices agreed with the majority that section 903 is applicable to a hearing before a Federal legislative committee; that an inquiry into past or present membership in the Communist party is an inquiry regarding official conduct of a city officer or employee and that the Charter is not a local law within the meaning of the City Home Rule Law. They were at variance, however, with the conclusion of the majority that petitioners were employees of the City of New York within the meaning of section 903.

In this court we are all agreed that the Communist party is a continuing conspiracy against our Government. (See, *Communications Assn. v. Douds*, 339 U.S. 382, 425 *et seq.*; *Dennis v. United States*, 341 U.S. 494, 564; Preamble to the Feinberg Law [L. 1949, ch. 360, § 1.]) We are also all in agreement that an inquiry into past or present membership in the Communist party is an inquiry regarding the official

conduct of an officer or employee of the City of New York. Loyalty to our Government goes to the very heart of official conduct in service rendered in all branches of Government. (See N. Y. Const., art. XIII, § 1; Education Law, § 3002; Civil Service Law, § 12a, 20; L. 1951, ch. 233, § 1, 8.) Communism is opposed to such loyalty. (*Communications Assn. v. Douds*, 339 U.S. 382, 425 *et seq.*, *supra*; *Dennis v. United States*, 341 U.S. 494, 564, *supra*.) Internal security [fol. 248] affects local as well as National Governments.

We are in disagreement in this court only as to two questions. They are (a) whether the Charter section is applicable to a hearing before a Federal legislative committee and (b) whether the petitioners are employees of the City of New York. All of the six Justices below were in accord in answering (a) in the affirmative.

As to (a), we, the majority, agree with all of the Justices below that section 903 is applicable to a hearing before a Federal legislative committee. The language in section 903 is: "*any* legislative committee, or *any* officer, board or body authorized to conduct *any* hearing or inquiry * * *." We cannot say that that language excepted a legislative committee of our National Government for we read "any" to mean "any".

As to (b), when the Legislature adopted the Charter of the City of New York and the Administrative Code it declared that it intended "to provide an administrative code for the city of New York harmonizing with the provisions of the New York city charter" (Administrative Code, § 982 1.0) and directed that the code was to be "construed liberally". (Administrative Code, § 982 2.0.) In section 984 1.0 of the Administrative Code the Legislature defined an employee as "Any person whose salary in whole or in part is paid out of the city treasury". This language cannot be misread. Petitioners are paid by check signed by the city treasurer with funds from the city treasury.

The Education Law (§§ 2553, 6201) empowers the Mayor of the City of New York to appoint the members of the board of education and to appoint and remove the members of the board of higher education. The City Charter (§ 522) requires the board of education to submit an annual written report to the Mayor. The Education Law (§§ 2576, 6202)

requires both boards to submit to the board of estimate expense budget estimates, just as city departments do (see, also, New York City Charter, § 895); counsel for the city is their counsel (New York City Charter, § 394, subd. a; *Matter of Kay* v. *Board of Higher Educ. of City of N. Y.*, 260 App. Div. 9, motion for leave to appeal denied 285 N.Y. 859); the boards of education and higher education are before us asserting, not denying, the applicability of section 903 of the City Charter and section 982-1.0 of the Administrative Code to them and the petitioner teachers. We have, in many cases involving teachers, written that in matters *strictly* educational or pedagogic a board of education is not a department of the city government, but an independent public body; that public education is a State and not a municipal function and that it is the policy of the State to separate matters of public education from the control of municipal government. (*Matter of Hirshfeld* v. *Cook*, 227 N. Y. 297, 301; *Matter of Divisich* v. *Marshall*, 281 [fol. 249] N. Y. 170; *Titusville Iron Co.* v. *City of New York*, 207 N. Y. 203, 208; *Gunnison* v. *Board of Educ. of City of N. Y.*, 176 N.Y. 11.) We have in so doing, however, been careful to point out, as already indicated, in *Matter of Hirshfeld* v. *Cook* (*supra*) that: "If the state through its legislature intends to make the board of education of the city wholly independent of municipal action and prevent the city or the officers and boards thereof from asserting any authority relating to matters connected with the public schools and the determination of the expenditures therefor, it should be stated by it in such clear language that its intention is unmistakable." (pp. 309-310) and that: "while the educational affairs in each city are under the general management and control of the board of education, such board is subject to municipal control in matters not *strictly* educational or pedagogic." (P. 304; emphasis supplied.) Thus, board of education employment must be added to other municipally paid service in determining seniority rights under section 31 of the Civil Service Law. (*Matter of Schaefer* v. *Bathgate*, 237 App. Div. 491, 494-495, affd. 262 N. Y. 492); employees of the board of education are officers of the city under section 896 of the New York City Charter making it a crime to conspire to defraud the city (*Peiffer* v. *Engel*, 200 Misc. 60); the offices of trustee

of Hunter College of the City of New York and of members of the board of higher education are offices "connected with the government of the City of New York" within the meaning of section 1549 of the Greater New York Charter (now New York City Charter, § 895) which prohibits dual office holding by city officers. (*Metzger* v. *Swift*, 258 N.Y., 440, *supra*; see, also, Education Law, §§ 2554, 2573, 6206; New York City Charter, § 896.)

The State has the power to determine what shall constitute a vacatur of public office or employment and, in enacting statutes, to *define* the terms used therein as in its wisdom it sees fit. Thus, it may define who are employees of the City of New York and we must accept the legislative definition as binding upon us. (*Matter of Bronson*, 150 N.Y. 1; McKinney's Cons. Laws of N.Y., Book 1, Statutes [1942 ed.], § 75; *People ex rel Champlin* v. *Gray*, 185 N.Y. 196, 200.) It has made the *source* of the compensation the determinant factor.

Petitioners are in reality asking us to take the words used to frame concepts affecting the administration of education in matters strictly educational and pedagogic and to enlarge and expand their meaning so as to include something which transcends matters that are strictly educational and pedagogic, on the one hand, and then rewrite the Administrative Code (§ 981-1.0) (subd. 7) so that the words "Any person whose salary in whole or in part is paid out of the city treasury" as used to define an employee of the city shall not mean that teachers are employees of the city, although their salaries are paid by check of the city [fol. 250] treasurer from the city treasury. This we may not do but must take clear, simple and unambiguous words of the Legislature as we find them. (*Meltzer* v. *Koenigsberg*, 302 N.Y. 523, 525; *Matter of Rathschuck*, 300 N.Y. 346, 350, 353; *Matter of Tishman* v. *Sprague*, 293 N.Y. 42, 50.)

Finally, it is urged that at the time the Charter was approved and when it became effective in 1938 the Legislature did not have in mind the specific purpose for which section 9-3 is now being used. Whether or not that be true is doubtful indeed since the Supreme Court of the United States has upheld the deportation of legally resident aliens because of

membership in the Communist party for periods between 1925 and 1939 in *Harisiades v. Shaughnessy* (342 U. S. 580). Section 903 became effective January 1, 1958. But even if it were to be accepted as true it would be of little moment here. More than fifty years ago in *Hudson River Tel. Co. v. Watervliet Turnpike & Ry. Co.* (135 N. Y. 393, 403-404), we said: "The words of the statute are to be interpreted according to their natural and obvious meaning, and, as the terms employed are not ambiguous, extrinsic facts are not available to restrict the authority which it plainly confers. The language, literally construed, includes undiscovered, as well as existing modes of operation. * * * It would be an unjust reflection upon the wisdom and intelligence of the law-making body to assume that they intended to confine the scope of their legislation to the present, and to exclude all consideration for the developments of the future." And, only recently in *Matter of Di Brizzi (Proskauer)* (303 N. Y. 206 [1951]), this court upheld the use of a statute (Executive Law, § 62, subd. 8, now § 63, subd. 8) to permit the creation of a "New York State Crime Commission", which was originally enacted a few weeks after our entry into World War I as a "Peace and Safety Act" (L. 1917, ch. 595) for the purpose of dealing with wartime sabotage, espionage and subversive activities of enemy agents and sympathizers, and the repeal of which the Attorney-General of the State had recommended to the Legislature because it was "suited to war conditions" (1918 Atty.-Gen. 16.). And so, here section 903 protects the people of the city and the State's chartered municipalities from dangers encompassed by the language of the statute, even though the precise danger may not have been envisioned at the moment of passage.

The orders appealed from should be affirmed, without costs.

DESMOND, J. (dissenting).

That communism in the United States is a conspiracy against our Government, and that participation in such a conspiracy is entirely inconsistent with the loyalty required [14 Cal. 2d] from a schoolteacher, are undisputed propositions which do not decide this case. Our duty, on this appeal as on any other, is to apply the law of this State as we find

them, to communists, ex-communists, and everyone else. No purpose, however high or absent, suspends the salutary rule that "statutes directed against known and stated evils, are not to be stretched to cover situations having no real or reasonable relation to those evils" (see McKinney's Cons. Laws of N. Y., Book 1, Statutes, § 392; cf. id., § 95, 141, 146, and cases cited; also *Kaplan and Sons Saddlery Co. v. Mulcahey*, 298 N. Y. 38, 44-45, and *Matter of Briggs v. New York City Dept. Pension Fund*, 299 N. Y. 8, 19). *Metropolitan Life Ins. Co. v. Durkee*, 301 N. Y. 376, 381). If more or different statutes are needed to rid the schools of communist teachers, it is for the Legislature to enact them, and the New York State Legislature has shown no reluctance to do so, nor has this court hesitated to enforce them (see the "Feinberg Law", Education Law, § 3022, as construed in *Thompson v. Wallin*, 301 N. Y. 476; *Matter of Adler v. Wilson*, 282 App. Div. 418, motion for leave to appeal denied 306 N. Y.). Ours is the judicial task, limited by judicial powers, of interpreting and applying section 903 of the New York City Charter as enacted in 1938. We find nothing in that section's language, history or known purposes to justify using it, as it is being used here, as authority for ousting public schoolteachers, employed by respondent board of education, because of their refusals to answer questions put to them by a subcommittee of the United States Senate, appointed to investigate the administration of the Federal Internal Security Laws, as to the teachers' past or present membership in the Communist party. All sides concede that, aside from the supposed applicability of section 903, the teachers could not be deprived of their positions, for exercising their Fifth Amendment right (see *Matter of Cruz*, 282 N. Y. 428, 433). We turn then to the Charter provision, and we find it clear, concise and complete: "§ 903.

"If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination,

election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify [fol. 252] upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency."

Section 903 is inapplicable to these appellants in this situation for at least two separate reasons; first, no appellant is an "employee of the city" within the meaning of the law; and, second, the United States Senate group whose questions appellants refused to answer was not authorized to conduct an inquiry into the property, affairs and government of the city or the official conduct of its officers and employees.

First, as to whether these teachers are "employees of the city", section 1 of article XI of our State Constitution makes public education a State function, and the policy of this State for a century "has been to separate public education from all other municipal functions and intrust it to independent corporate agencies" such as boards of education (*Gunnison v. Board of Educ. of City of N. Y.*, 176 N. Y. 11, 23). "The board of education is a corporation separate and distinct from the city of New York" (*Titusville Iron Co. v. City of New York*, 207 N. Y. 203, 208). Matters of appointment of teachers and permanency of their employment have been, by the State Education Law, taken away from the municipalities and given to the education boards (*Matter of Emerson v. Buck*, 230 N. Y. 380, 385). The grants of authority to the boards to administer public education within New York City are exclusive, and negative any authority in the city itself to exercise like powers (*People ex rel. Wells & Newton Co. v. Craig*, 232 N. Y. 125, 135). The long struggle between the Buffalo board of education and the City of Buffalo described in *Matter of Emerson v. Buck* (*supra*) was ended by this court's declaration thirty years ago, in *Matter of Fahrmann v. Graves* (235 N. Y. 77, 82, 83), that, while the city controls the total amount

to be expended for education, it has no control whatever over the manner of its spending (see, also, *Matter of Brenn v. Board of Educ. of City of N. Y.*, 245 N. Y. 8, 14). There followed an impressive train of cases holding that public schoolteachers, in the cities of the State, were employees, not of those cities but of the local boards of education as separate corporate bodies (*Matter of Gelson v. Berry*, 233 App. Div. 20, 21, affd. 257 N. Y. 551; *Matter of Rainsdale v. Board of Educ. of City of N. Y.*, 282 N. Y. 322, 325; *Nelson v. Board of Higher Educ. of City of N. Y.*, 628 App. Div. 144, 148, affd. 288 N. Y. 649).

It is, therefore, indisputable not only that the State Constitution and judicially declared States policy bar New York City from the role of "employer" of teachers, but [fol. 253] also, that, as between the City of New York and these teachers, there are none of the marks of an employer-employee relationship, since it is not the city, but the separate boards of education, which select and hire the teachers, pay them, control their teaching work, and are empowered to remove them for cause after hearing (see Education Law, § 2; subd. 14; and §§ 2550, 2551, 2573, 3012, 3022, 6206). Statutes and decisions (cited in great numbers in respondent's brief) relating to other than pedagogical matters or pedagogical personnel have nothing to do with the present problem. The question here is as to whether teachers are "employees of the city". Actually, the only ground suggested for an affirmative answer to that question is the definition in section 981-1.0 of the New York City Administrative Code (a statute separate from, but complementary to, the Charter) of "employee" as "any person whose salary in whole or in part is paid out of the city treasury." The salaries of teachers are "paid out of the city treasury" from funds there on deposit to the credit of the board of education, but we refuse to believe that this sixteen-word definition, in a general statute not concerned with education, destroys the whole public policy of this State, worked out in more than a century of struggle, of seeing to it that public schoolteachers are definitely not employees of the cities of this State. Until now, there has never been a decision of this court holding any teacher to be an "employee" of a city.

A second, and separate, reason why section 903 has no application to this situation is that this Senate subcommittee was not authorized to and disclaimed any purpose to conduct an inquiry into New York City's governmental affairs or the "official conduct" of any "employee" of the city or of the board of education. It may be possible, grammatically, to read the statute's language: "any legislative committee * * * authorized to conduct any hearing or inquiry" as unrelated to the later phrases in the same sentence: "regarding the property, government or affairs of the city * * *" or regarding the * * * official conduct of any officer or employee of the city". But that grammatical possibility is a logical impossibility, and the result would be a statutory monstrosity, whereby an upstate town board or a legislative committee from another State could bring about the firing of a New York City employee because the latter refused to answer the questions of the interlopers about his official conduct. We do not so construe statutes, especially since we know historically (and as respondents themselves tell us) that section 903 was one of the by-products of the "Seabury Investigation" of 1932. It is most unlikely that the New York State Legislative Committee, of which Judge Seabury was counsel, or the Legislature itself in setting up the Charter Revision Commission in 1934, or the [fols. 254-255] commission in its 1936 recommendation of a new charter for New York City, or the Legislature or the people of the city in voting for it, intended to deal with a situation where a foreign legislative body might question New York City employees about New York City's governmental affairs. What section 903 contemplates is an inquiry by a New York State, or New York City, legislative committee or officer or board or body authorized to investigate the city government. This subcommittee of the United States Senate was not and did not on this occasion claim to be such a committee, officer, board or body.

What section 903 means is that a city officer or employee must answer the question of a qualified investigating body concerning the city's affairs, or concerning the conduct of city business by the questioned city officer or employee, or by any other city officer or employee, or forfeit his employment. When, in 1949, the Legislature determined (see findings attached to L. 1949, ch. 369) that the Communist party

had been infiltrating into public employment in the public schools, it passed the appropriate (Feinberg) Act to deal with that situation (Education Law, § 3022). But the 1938 City Charter of New York dealt with something else entirely, that is, with facilitating local and State investigations of New York City affairs. Membership of teachers in the Communist party may, under the Feinberg law, prove the teacher's unfitness to be a teacher, and Feinberg Law procedures should be used to bring about any removal for that cause. Refusal of a teacher in a properly authorized investigation, to co-operate by answering questions as to membership in subversive organizations may justify dismissal after hearing, under sections 2573 or 6206 of the Education Law, and those procedures are available and lawful.

In each case, the order should be reversed and the petition granted, with costs in all courts.

Lewis, Ch. J., Froessel and Van Voorhis, JJ., concur with Conway, J., Desmond, J., dissents in opinion in which Dye and Fuld, JJ., concur.

Orders affirmed.

[fol. 256] In Court of Appeals of New York

No. 390

In the Matter of the Application of Mary I. Daniman and ors., Appellants, for an Order etc.,

vs.

The Board of Education of the City of New York, Respondent, Annulling the Dismissal of Petitioners, etc.

And another proceeding (Shlakman)

Remittitur—April 22, 1954

Be it remembered, That on the 20th day of October, in the year of our Lord one thousand nine hundred and fifty-three Mary I. Daniman and ors., the appellants in these causes came here unto the Court of Appeals, by Harold I. Cammer

and ors., their attorneys, and filed in the said Court Notice of Appeal and return thereto from the orders of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And the Board of Education of the City of New York, the respondent in said causes, afterwards appeared in said Court of Appeals by Denis M. Hurley, its attorney.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard these causes argued by Mr. Paxton Blair, of counsel for all the appellants except Hary Slochower, and by Mr. Ephraim London, of counsel for the appellant Harry Slochower, and by Mr. Michael A. Castaldi, of counsel for the respondents, and a brief having been filed on behalf of the amicus curiae, and after due deliberation had thereon did order and adjudge that the orders of the Appellate Division of [fol. 257] the Supreme Court appealed from herein be and the same hereby are affirmed, without costs.

And it was also further ordered, that the records aforesaid and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said orders be affirmed, without costs, as aforesaid.

And hereupon, as well as the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, etc.

(S.) Raymond J. Cannon, Clerk of the Court of Appeals of the State of New York.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 258] IN COURT OF APPEALS OF NEW YORK

Present, Hon. Edmund H. Lewis, Chief Judge, Presiding.

Mo. No. 253

In the Matter of the Application of MARY I. DANIMAN and ors., Appellants,

for an Order, etc.,

vs.

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, ETC., RESPONDENT

Annulling ~~the~~ Dismissal of Petitioners, etc., and another proceeding (Shlakman).

MEMORANDUM OPINION—July 14, 1954

A motion for reargument and to amend the remittitur in the above cause having been heretofore made upon the part of the petitioners-appellants herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motion, insofar as it seeks reargument, be and the same hereby is denied, and it is

Further Ordered, that the said motion, insofar as it seeks to amend the remittitur, be and the same hereby is denied except as to petitioner-appellant Slochower, on the ground that no question under the Federal Constitution was [fol. 259] presented by them to the Court of Appeals. Motion by petitioner-appellant Slochower granted to the extent indicated. Return of remittitur requested and when returned it will be amended by adding thereto the following:

> Questions under the Federal Constitution were presented and passed upon by the Court of Appeals, viz., whether the rights of petitioner-appellant Slochower to due process under the Fourteenth Amendment to the Federal Constitution were violated by the construction and application herein of New York City Charter section 903, in that petitioner-appellant Slochower claims: (1) that the automatic operation of section 903 deprives him of tenure and of a trial to which he was entitled;

(2) that the congressional sub-committee was not empowered to consider and specifically stated that its questions would not be directed to official conduct of city employees and that petitioner-appellant Slochower, therefore, could not have known at the time of the inquiry that the questions asked of him and which he refused to answer related to his official conduct; and (3) that at the time of the inquiry, there had been no determination under the Feinberg Law that the Communist Party was a "subversive" organization, so that membership therein would affect a teacher's eligibility and that the retroactive application of that determination is constitutionally prohibited. The Court of Appeals held that petitioner-appellant Slochower was not denied due process under the Fourteenth Amendment.

And the Supreme Court, Kings County, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

/s/ GEARON KIMBALL, *Deputy Clerk.*

[fol. 260] SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

In the Matter of the Application of VERA SHLAKMAN, Bernard E. Reiss, Harry Slochower, Sarah R. Riedman, Henrietta A. Freidman and Melba Phillips, Appellants

— against —

THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK, APPELLEE

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that Harry Slochower, one of the above-named Appellants, hereby appeals to the Supreme Court of the United States from the final decree of the Court of Appeals of the State of New York affirming the dismissal of Appellant's petition for an order directing the Appellee to restore Appellant to his position as Associ-

ate Professor at Brooklyn College. The final decree of the Court of Appeals of the State of New York was entered in this proceeding on July 14, 1954.

This appeal is taken pursuant to 28 U.S.C. Sec. 1257 (2).

II. The Clerk of the Supreme Court of the State of New York, County of Kings, will please prepare a transcript of the record in this cause, and include in said transcript the following:

[fol. 261] The Papers on Appeal in this proceeding to the Court of Appeals of the State of New York.

The Remittitur from the Court of Appeals, as amended pursuant to the order of the Court of Appeals dated July 14, 1954.

III. The following questions are presented by this appeal:

1. Whether Section 903 of the New York City Charter contravenes the Fifth Amendment to the Constitution of the United States in that it imposes as a condition to public employment, the surrender of the Federal Constitutional right to refuse to be a witness against one's self.

2. Whether Section 903 of the New York City Charter, pursuant to which Appellant Harry Slochower was discharged without notice or hearing from employment as an Associate Professor of Brooklyn College, and was disqualified from future employment by the City of New York or any of its agencies, contravenes the due process clause of the Fourteenth Amendment to the Constitution of the United States. The relevant provisions of Section 903 of the New York City Charter provide for termination of employment by New York City of any employee who refuses, when interrogated by any legislative committee, to answer any question relating to the affairs of the City on the ground that his answer may tend to incriminate him.

3. Whether Section 903 of the New York City Charter, as interpreted in this case, contravenes Article I, Section 10, of the Constitution of the United States and the due process clause of the Fourteenth Amendment to the Constitution of the United States, in that it imposes the penalty of discharge from employment

[fol. 262] for an act brought retroactively within the purview of the section, and which Appellant could not have known, was within the purview of the section. Section 903 of the New York City Charter was made applicable to this case by virtue of provisions incorporated in a statute after Appellant's discharge.

4. Whether Appellant Harry Slochower was deprived of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, the said Appellant having been discharged without notice or hearing from a position to which he had a statutory and contractual right, for refusing, when interrogated by a sub-committee of the United States Senate, to state whether he had been a member of the Communist Political Association in 1940 and 1941, on the ground that the answer might tend to incriminate him.

Dated, New York, October 5th, 1954.

Ephraim S. London, Attorney for Appellant, Harry Slochower, Office & P. O. Address, 150 Broadway New York 38, N. Y.

To: Hon. Adrian P. Burke, Corporation Counsel of the City of New York, Municipal Building, New York 7, N. Y.
Hon. Francis J. Simnott, Clerk of the Supreme Court of the State of New York, County of Kings.

Clerk's Certificate to foregoing paper omitted in printing.

[fols. 263-265] *Proof of Service* (omitted in printing).

[fol. 266] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 466

HARRY SLOCHOWER, Appellant

vs.

THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK

ORDER NOTING PROBABLE JURISDICTION—February 7, 1955

Appeal from the Court of Appeals of the State of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

(2467-9)